No. 10014

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN LUHRING and MARGARET MORRIS,
as joint tenants,

Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC.,
a corporation,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 366

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

ROTARY COLORPRINT, 590 FOLSOM ST., SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

MESSRS. LOEB & LOEB,
HERMAN F. SELVIN, Esq.,
610 Pacific Mutual Building,
523 West Sixth Street,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
In and For the County of Los Angeles

No. 411053

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Plaintiffs,

vs.

UNIVERSAL PICTURES CORPORATION, a corporation; UNIVERSAL PICTURES COMPANY, INC., a corporation,

Defendants.

AMENDED COMPLAINT

Comes now the plaintiffs, and as a matter of course, and for cause of action against the above named defendants, complain and allege as follows, towit:

I.

Plaintiffs are citizens of the United States and residents of the City of Los Angeles, County of Los Angeles, State of California. That defendant, Universal Pictures Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, having and maintaining a place of business in the State of California, to-wit, in the County of Los Angeles, State of California. That the defendant, Universal Pictures Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Dela-

ware, and has and maintains a place of business and is doing business in the State of California, to wit, in the County of Los Angeles, State of California.

II.

That at all times herein mentioned, the Superior Court in Berlin, Germany, also known as the Landgericht was and is a court of general jurisdiction and is a court of record, duly created and organized under and by virtue of the laws of the Republic of Germany.

That at all times herein mentioned, the District Court of [9] Appeal in Berlin, Germany, also known as Kammergericht, was and is a court of general jurisdiction and a court of record, duly created, and organized under and by virtue of the laws of the Republic of Germany, and the Supreme Court of Germany, at Leipzig, Germany, also known as the Reichsgericht, was and is at all times herein mentioned, a court of appellate jurisdiction and is a court of record, duly created and organized under and by virtue of the laws of the Republic of Germany.

III.

That on or about March 4, 1930, a judgment was rendered in said Landgericht, in an action entitled, "May Film Corporation, represented by its directors, Joe May and Manfred Liebenau", vs. defendant, Universal Pictures Corporation, represented by its attorneys, Counsellor Justice, Dr. Rosenberger, Dr. Richard Frankfurter, and Dr. Gerhard

Frankfurter, which said action is numbered with the number of the case given under the German laws, as follows: 74.0.590.26/70, which said judgment provided, among other things, that said plaintiff should recover nothing and that defendant take nothing by its cross-complaint.

That thereafter plaintiff appealed from the judgment of said Landgericht to the court of proper appellate jurisdiction, towit, the Kammergericht.

That said appeal received the number alloted to cases under the laws of Germany, being No.
25.U.5849/30
74.0.590/26
and that in said action the May Film Corporation, described therein under its German name, to wit: May Film Aktiengesellschaft, was in liquidation and was represented by its liquidator, Attorney Dr. Alexander Meier, whose attorney was Dr. Paul Dienstag. That the defendant, Universal Pictures Corporation was represented by its board of directors, President Carl Laemmle, Vice President Robert H. Cochrane, Secretary Helen E. Hughes, Treasurer E. H. Goldstein, and said defendant's counsel was attorney Dr. Sarre. [10]

That on July 27, 1932 said Kammergericht, or court of appellate jurisdiction, rendered its decision, which judgment provided, among other things, that the defendant, Universal Pictures Corporation, is ordered to pay to the plaintiff, 50,000 German Reichsmarks, with interest at the rate of two per cent above the discount rate of the German Reichs

Bank, and that said interest should commence July 1, 1926.

That thereafter, both plaintiff and defendant, Universal Pictures Corporation, appealed from said judgment of said Kammergericht in an action in the nature of a request for a revision, in which the May Film Corporation was represented by its liquidator, whose attorney was Dr. Fuchlocher, and the defendant, Universal Pictures Corporation, was represented by its board of directors, whose attorney was Attorney Counsellor of Justice Dr. Schrömbgens. That said Reichsgericht rendered its judgment on February 3, 1933, which provided, among other things, that the appeal and the joint appeal against the judgment of the Kammergericht were denied, and that the judgment of said Kammergericht as hereinbefore set out, was affirmed, and thereupon said judgment became final.

IV.

That a dispute arise between the liquidator of the May Film Corporation and its president, Joe May, as to who was the owner of and entitled to the proceeds of said judgment. That as a result of said dispute, an action was commenced in the Landgericht in Berlin, Germany, in a case in which the Bank for Foreign Commerce, a corporation under its German name of Bank Für Auswärtigen Handel Aktiengesellschaft, was plaintiff, represented by its counsel, attorneys Dr. Friedrich Kempner, Heinz Pinner and Joachin Beutner; that the de-

fendant was the May Film Corporation in liquidation, under its German name as hereinbefore set out, represented by its liquidator, Kurt Hausdorff, whose [11] attorney was Dr. John A. Fagg. That on or about February 25, 1935, said court rendered its judgment, providing, among other things, as follows: that the claim asserted in the case of May Film Corporation vs. defendant, Universal Pictures Corporation, herein, No. 74.0.590.26 of the Landgericht in Berlin in the amount of 50,000 German Marks, with interest, was and is the property of Joe May and not of the May Film Corporation in liquidation, and that therefore the assignment (hereinafter more particularly set out) made by Joe May to said Bank for Foreign Commerce is legally valid. That said judgment has become and now is final under the German law.

V.

That the assignment from said Joe May to the Bank for Foreign Commerce, immediately hereinbefore referred to, is as follows:

On February 9, 1935, in Berlin, German.., the May Film Corporation borrowed a sum of money from the aforesaid bank for Foreign Commerce, in which said transaction, Joe May and one Fritz Mandl signed a contract of guaranty and as a part of said transaction, said Joe May assigned the judgment of the District Court of Appeal. That subsequently thereto said Fritz Mandl caused the said claim of the Bank for Foreign Commerce to be paid, and

according to the laws of the Republic of Germany, when a guarantor pays an obligation and a judgment has theretofore been assigned to the creditor as security for the payment of said debt, said judgment is re-assigned by operation of law, to said paying guarantor, and thereupon becomes a property of said guarantor. That under the said German law, when said Fritz Mandl paid the claim or obligation of Joe May to said Bank for Foreign Commerce, said Fritz Mandl became the owner of the judgment against defendant, Universal Pictures Corporation, hereinbefore referred to. That said Fritz Mandl did pay said obligation and thereupon became the owner [12] of said judgment. That notice of the payment of the obligation of said Joe May together with the assignment from said Bank for Foreign Commerce of said judgment to said Fritz Mandl was given to the defendant in a letter dated February 25, 1936, and mailed to the defendant, Universal Pictures Corporation, on said date by said Bank for Foreign Commerce.

That thereafter said Fritz Mandl did for valuable consideration, sell, transfer and assign the judgment against defendant, Universal Pictures Corporation, hereinbefore described, to the Union Bank and Trust Co. of Los Angeles, and said bank subsequently and prior to the commencement of this action, did sell and assign said judgment to the plaintiffs herein.

That said judgment against defendant, Universal Pictures Corporation, hereinbefore referred to,

is a final judgment against defendant, Universal Pictures Corporation, and due demand has been made upon the said defendant for the payment of said judgment and no part thereof has been paid, and the whole thereof, including interest from the 1st day of July, 1936, is now due, owing and unpaid from the defendant, Universa*id* Pictures Corporation, to the plaintiffs.

VI.

That the discount rates of the German Reichs Bank have varied since the 1st day of July, 1926, to the present, and may vary from time to time and be changed, even after this suit is filed. That for the convenience of the Court, plaintiffs have computed the interest on the claim according to the judgment, up to the 1st day of January, 1937, and that said interest amounts to 38,142.48 German Reichs Marks. That the plaintiffs will ask leave of court at the time of trial to insert in this complaint by interlineation, the total interest to said date. That the judgment in the sum of 50,000 German Reichs Marks, plus the interest thereon, according to said judgment, to the 1st day [13] of January, 1937, is the total sum of 88,142.48 German Reichs Marks. That the value of 88,142.48 German Reichs Marks in lawful money of the United States is the sum of $35,256.99.

VII.

That plaintiffs are informed and believe and basing this allegation upon such information and belief, allege that shortly prior to the commencement of this action, defendant, Universal Pictures Corporation, was dissolved under and by virtue of the laws of the State of New York, and that defendant, Universal Pictures Company, Inc., assumed and agreed to pay any and all of the obligations of the defendant, Universal Pictures Corporation; and plaintiffs allege that this obligation sued upon herein is an obligation of the type that was and is assumed by said defendant, Universal Pictures Company, Inc., and that by reason thereof, the defendants, and each of them, are indebted to plaintiffs for the amounts prayed for herein.

Wherefore, Plaintiffs pray judgment against the defendants, and each of them, for the sum of $35,-256.99, plus interest on the 50,000 German Reichs Marks at the rate of two per cent above the discount rate of the German Reichs Bank from the 1st day of January, 1937, together with costs of suit incurred herein, and for such other and further relief as to the court may seem just and equitable in the premises.

ELLIS I. HIRSCHFELD and
RATZER, BRIDGE & GEBHARDT
By ELLIS I. HIRSCHFELD,
Attorneys for plaintiffs [14]

(Duly Verified.)

[Endorsed]: Filed Feb. 23, 1937. [15]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL
TO FEDERAL COURT

The verified petition of Universal Pictures Company, Inc., a corporation, respectfully shows:

I

At the commencement of the within action and at all times material herein, defendant Universal Pictures Company, Inc. was and it now is a corporation duly organized and existing under and by virtue of the laws of the state of Delaware and duly authorized to transact and transacting business in the state of California. By reason of the foregoing facts said defendant at all times material herein has been and now is a citizen of the state of Delaware.

II.

At all times during the period of its existence defendant Universal Pictures Corporation was a corporation duly organized and existing under and by virtue of the laws of the state of New York and by reason of said fact said corporation at all times during the period of its existence was a citizen of the state of New York. Prior to the commencement of the within action said corporation was dissolved by proceedings duly and regularly had in said state of New York. [16]

III

Defendant Universal Pictures Company, Inc. is informed and believes, and therefore alleges, that at the commencement of the within action and at all times material herein, plaintiffs John Luhring and Margaret Morris, were and now are, and each of them was and now is, citizens of the state of

California residing within the Southern United States District in said state. By reason of the foregoing facts the within cause is one wholly between citizens of different states.

IV

The matter in controversy herein, exclusive of interest and costs, exceeds in value the sum of $3,000, said matter being the right of the plaintiffs to recover the sum of $35,256.99 from defendants upon an alleged judgment rendered against defendants in Germany.

V

The within cause is one of which the United States District Court is given original jurisdiction in that it is a cause wholly between citizens of different states in which the matter in controversy exceeds in value the sum of $3,000.

Wherefore, defendant Universal Pictures Company, Inc. respectfully prays that the within cause be transferred and removed to the United States District Court for the Southern District of California, Central Division, and that all further proceedings herein be stayed.

Dated: March 4, 1937.

LOEB, WALKER AND LOEB,
Attorneys for defendant Universal Pictures Company, Inc. [17]

(Duly verified.)

Received copy of the within Petition this 4th day of March, 1937.

ELLIS I. HIRSCHFELD,
Attorneys for plaintiffs.

[Endorsed]: Filed Mar. 4, 1937. [18]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

That Universal Pictures Company, Inc., a corporation, as principal, and Fidelity and Deposit Company of Maryland a corporation organized and existing under and by virtue of the laws of the state of Maryland, and authorized to transact business under the laws of the state of California, as surety, are held and truly bound unto John Luhring and Margaret Morris, plaintiffs in the above-entitled action, their successors or assigns, in the sum of $500, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The condition of the above obligation is such that Whereas, Universal Pictures Company, Inc., a corporation, one of the defendants in the above action, has applied or is about to apply, by petition to the Superior Court of the State of California in and for the County of Los Angeles, for the removal of a certain cause therein pending, wherein said John Luhring and Margaret Morris are plaintiffs and said Universal Pictures Company, Inc. is one of the defendants, to the United States District Court for the Southern District of California, Central Division, for further [19] proceedings, on the grounds in said petition set forth, and for the stay of all further proceedings, in said action,

Now, Therefore, if the above-named defendant shall within thirty days from and after the date of the filing of said petition, enter in said United States District Court a truly certified copy of the record in the above-entitled action, and shall pay or cause to be paid all costs that may be awarded therein by the said United States District Court if such Court shall hold that such suit is wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

Dated, this 4th day of March, 1937.

UNIVERSAL PICTURES
COMPANY, INC.,
By (Signed) EDWARD MUHL
Assistant Secretary
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND
By W. H. CANTWELL
Its Attorney-in-fact.

Attest:
(Company Seal) S. M. SMITH
Agent

State of California
County of Los Angeles—ss.

On this 4th day of March, 1937, before me, Theresa Fitzgibbons, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and S. M. Smith, known to me to be the persons

whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] THERESA FITZGIBBONS

Notary Public in and for the State of California, County of Los Angeles.

My Commission expires May 3, 1938.

Status of Company and Authority of Agent Good for Bond of $500.00.

KURTZ KAUFFMAN
Court Commissioner
March 4, 1937.

Bond Approved Mar. 10, 1937.

ROBERT W. KENNY
Judge

Received copy of the within Bond this 4 day of March, 1937.

ELLIS I. HIRSCHFELD
Attorneys for plaintiffs.

[Endorsed]: Filed Mar. 4, 1937. [20]

[Title of Superior Court and Cause.]

NOTICE OF FILING OF PETITION FOR REMOVAL AND BOND AND OF MOTION TO REMOVE

To Plaintiffs Above-Named and to Their Attorneys of Record:

You and Each of You Will Please Take Notice that defendant Universal Pictures Company, Inc. will this day file in the within court its petition for removal of the within action to the United States District Court for the Southern District of California, Central Division, and its bond in connection therewith.

You and each of you are further notified that on Wednesday, March 10, 1937, at the hour of ten o'clock a. m., or as soon thereafter as counsel may be heard, said defendant will move the above-entitled court in Department 35 thereof, for an order of said court transferring and removing the within action to the said United States District Court, and staying all further proceedings herein.

Said motion will be made upon the ground that the within action is wholly between citizens of different states and is one of which the United States District Courts are given original jurisdiction.

Said motion will be based upon this notice of motion, upon said petition for removal, and upon all of the files and [21] records herein.

Dated: March 4, 1937.

LOEB, WALKER AND LOEB.
By HERMAN F. SELVIN,
Attorneys for defendant Universal Pictures Company, Inc.

Received copy of the within Notice this 4 day of March, 1937.

ELLIS I. HIRSCHFELD,
Attorneys for plaintiff.

[Endorsed]: Filed Mar. 4, 1937. [22]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL TO FEDERAL COURT AND STAY OF PROCEEDINGS

This matter having come on regularly to be heard in Department 35 of the above-entitled court, upon the petition of defendant Universal Pictures Company, Inc., and it appearing that the within cause is wholly between citizens of different states, that the matter in controversy exceeds in value the sum of $3,000, and that the action is one of which the United States District Court is given jurisdiction, and that defendant Universal Pictures Company, Inc. has duly petitioned for removal thereof to the United States District Court for the Southern District of California, Central Division, and has filed a good and sufficient bond in connection therewith,

Now, Therefore, It Is Ordered that the within action be and it hereby is transferred and removed to the United States District Court for the Southern District of California, Central Division.

It Is Further Ordered that all proceedings herein in the within court be and they hereby are stayed.

Dated: March 10th, 1937.

ROBERT W. KENNY,
Judge.

O. K.
K. D. L.
(Kenny)

[Endorsed]: Filed Mar. 10, 1937. [23]

CERTIFICATE OF CLERK TO RECORD ON REMOVAL

State of California,
County of Los Angeles—ss.

No. 411053

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents and orders consisting of Complaint, Summons, Amended Complaint, Stipulation, Notice of Filing Petition for Removal, Petition for Removal, Bond on Removal, Minute Order of March 10, 1937 granting petition for removal and Formal Order of Removal to the United

States District Court for the Southern District of California (Central Division) in the action of John Luhring et al vs. Universal Pictures Corporation, a corp., to be full, true and correct copies of all of the original documents on file and/or of record in this office in said action to date.

In Witness Whereof, I have heerunto set my hand and affixed the seal of the Superior Court this 26th day of March, 1937.

[Court Seal] L. E. LAMPTON,
County Clerk.
By E. GERST,
Deputy.

[Endorsed]: Filed Apr. 2, 1937. [24]

In the United States District Court
Southern District of California
Central Division

No. 7962-J

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Plaintiffs,

vs.

UNIVERSAL PICTURES CORPORATION, a corporation, UNIVERSAL PICTURES COMPANY, INC., a corporation,

Defendants.

AMENDED ANSWER

Defendant Universal Pictures Company, Inc., for itself alone, answers the amended complaint on file herein, as follows:

I.

Answering paragraph I of said amended complaint answering defendant admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and that it maintains a place of business and is doing business in the county of Los Angeles, state of California. In this connection answering defendant alleges that it is duly authorized to transact such business in said state. Answering defendant further admits that at all times during the period of its existence Universal

Pictures Corporation was a corporation duly organized and existing under and by virtue of the laws of the state of New York, authorized to transact and transacting business in the state of California. Prior to the commencement of the within action said defendant was dissolved by proceedings duly and regularly had in said state of New York, since which time said defendant has not transacted, and is not now transacting any business whatever. [25]

II.

Answering defendant admits the allegations contained in paragraph II of said amended complaint. In that connection answering defendant is informed and believes and therefore alleges that under and by virtue of the laws of the Republic of Germany, as they existed at all times material herein, it was necessary, in order for any of the courts mentioned in said paragraph II to have or acquire jurisdiction of the person of a defendant in any action commenced or pending therein, that process of said court be duly and regularly served upon such defendant or that such defendant voluntarily appear and submit to the jurisdiction of the court, and if the defendant be a corporation, that the person or persons upon whom process is served and who make or purport to make an appearance on behalf of the defendant be duly and regularly authorized by the defendant so to do.

III.

Answering the allegations contained in paragraph III of said amended complaint defendant denies that Universal Pictures Corporation was represented, in the action referred to in said paragraph, by its attorneys or by any person or persons authorized to appear for or represent said Universal Pictures Corporation in said action; or that said Universal Pictures Corporation was represented by its board of directors, or by President Carl Laemmle or Vice-President Robert H. Cochrane or Secretary Helen E. Hughes or Treasurer E. H. Goldstein, or by any person or persons whatsoever authorized to represent or appear for it. Save and except as hereinabove directly denied. answering defendant has no information or belief sufficient to enable it to answer the allegations contained in said paragraph III, and therefore, and placing its denial upon that ground, denies generally and specifically each and every allegation contained in said paragraph III. [26]

IV.

Answering defendant has no information or belief sufficient to enable it to answer the allegations contained in paragraphs IV, V and VI of said amended complaint, and therefore, and placing its denial upon that ground, denies generally and specifically each and every allegation contained in said paragraphs, or in any or either of them. In this connection answering defendant alleges that if the actions and proceedings referred to in said paragraphs were

had or taken, neither answering defendant nor defendant Universal Pictures Corporation was a party thereto, had any knowledge thereof, or was given any notice thereof, by reason whereof said actions and proceedings, if had or taken, were not, and are not, binding in any way upon answering defendant.

V.

Answering paragraph VII of said amended complaint answering defendant admits that prior to the commencement of the within action Universal Pictures Corporation was dissolved under and by virtue of the laws of the state of New York, and that answering defendant assumed and agreed to pay all just and valid obligations of said Universal Pictures Corporation, subject, however, to all defenses, equities, set-offs and counterclaims that might be or have been available to said Universal Pictures Corporation. Save and except as hereinabove expressly admitted answering defendant denies generally and specifically each and every allegation contained in said paragraph VII.

For a Further, Separate and Affirmative Defense, Answering Defendant Alleges:

I.

Answering defendant is informed and believes and therefore alleges that at all times material herein it was and [27] is the law of the Republic of Germany that before any court of record of said

country has or obtains jurisdiction of the person of any defendant in an action pending in such court it is necessary that process of said court be served, if such defendant is a corporation, upon some person duly and regularly authorized and designated by said corporation as its agent for the receipt and service of process, or that such defendant voluntarily appear in such action by some person or persons duly and regularly authorized by such defendant so to do.

II.

At no time has defendant Universal Pictures Corporation done or transacted any business in the Republic of Germany, or authorized or designated any person as its agent or representative to accept or receive service of process or to appear for or on its behalf in any action, commenced or pending in any court of said country.

III.

No process of any court of the Republic of Germany referred to in the amended complaint on file herein was ever served on any authorized or designated agent or representative of said Universal Pictures Corporation in or in connection with any of the actions referred to in said amended complaint, nor was any person appearing or purporting to appear for said Universal Pictures Corporation in any of said actions ever authorized so to do; and any such appearance or appearances as may have been made were, and each of them was, made without the

knowledge, consent or authority of said Universal Pictures Corporation.

IV.

By reason of the foregoing facts the court or courts purportedly rendering the judgments refe*r*ed to in said amended complaint never had or acquired jurisdiction of the person of said Universal Pictures Corporation, and said judgments are and at all [28] times have been, and each of them is and at all times has been, void and of no force or effect.

For a Further, Separate and Second Affirmative Defense, Answering Defendant Alleges:

I.

Answering defendant is informed and believes and therefore alleges, that at all times material herein it was and is provided by the laws of the Republic of Germany that any person having obtained a judgment for the payment of money against another might enforce and satisfy said judgment by causing an order or writ of execution to be issued by the Amstergericht (which was and is a duly and regularly constituted court of record of the Republic of Germany) and levied upon the property and assets of the judgment debtor; and that when such property or assets consisted of a debt owing from a third person to the judgment debtor (including debts evidenced by a

judgment in favor of such judgment debtor against such third person) such assets might be levied upon and seized by causing an order or writ of attachment and assignment to be issued by said Amstergericht and served upon said third person. Answering defendant is further informed and believes and therefore alleges that at all times material herein it was and is provided by the laws of the Republic of Germany that said Amstergericht in issuing such order of attachment and assignment should provide and order therein that the third person owing such debt must not make payment thereof to the judgment debtor, that the judgment debtor must not dispose of said debt or collect the same, and that said debt should be forthwith assigned to the attaching or judgment creditor. Answering defendant is further informed and believes and therefore alleges that at all times material herein it was and is [29] provided by the laws of the Republic of Germany that upon the issuance of such an order of attachment and assignment and the service thereof upon a third person owing a debt to the judgment debtor, said third person is and becomes enjoined and prohibited from paying said debt to anyone other than the attaching or judgment creditor, said judgment debtor is and becomes enjoined and prohibited from disposing of or collecting said debt, and said debt is forthwith and by operation of law assigned and transferred to the attaching or judgment creditor.

II.

On or about December 5, 1935 one Universum-Film Aktiengesellschaft, a German corporation, (hereinafter referred to as U F A) by proceedings duly and regularly had and taken in the Landergericht (which was and is a regularly constituted court of record of the Republic of Germany) recovered and caused to be entered a judgment of said court against May-Film Aktiengesellschaft (which was and is the same corporation referred to by that name in the complaint on file herein) under and by virtue of the terms of which said judgment said May-Film Aktiengesellschaft was ordered to pay to said U F A the sum of 81,045.01 Reichmarks, together with interest. Thereafter on or about April 6, 1936, by proceedings duly and regularly had and taken in the Kammergericht (which was and is a regularly constituted court of appeal of said Republic of Germany) said judgment was affirmed. Ever since said last mentioned date said judgment has been and now is final and in full force and effect.

III.

On or about June 16, 1936, by proceedings duly and regularly had in the Amstergericht (which was and is a duly and regularly constituted court of record of the Republic of Germany, having jurisdiction of matters of execution and attachment) in a matter to which said U F A and said May-Film Aktiengesellschaft [30] were parties and in which

matter both of said parties duly and regularly appeared, an order of attachment and assignment was duly and regularly entered and ever since has been and is now in full force and effect. Under and by virtue of the terms of said order of attachment and assignment the claim of said May-Film Aktiengesellschaft against defendant Universal Pictures Corporation arising out of the alleged judgment against said defendant referred to in the amended complaint of file herein, was attached, said Universal Pictures Corporation was ordered not to make payment thereof to said May-Film Aktiengesellschaft, said May-Film Aktiengesellschaft was ordered not to dispose of, or collect, the said claim or judgment, and said alleged claim or judgment was assigned to U F A. Said order of attachment and assignment was duly and regularly served upon Universal Pictures Corporation prior to the commencement of the within action.

IV.

Answering defendant is informed and believes and therefore alleges that at all of the times and proceedings hereinabove in paragraphs II and III of this affirmative defense referred to, and until the service of said order of attachment and assignment, said May-Film Aktiengesellschaft was and remained the owner of the alleged judgment against Universal Pictures Corporation referred to in the amended complaint on file herein.

V.

Answering defendant is informed and believes and therefore alleges that at all times material herein it was and is provided by the laws of the Republic of Germany that the assignee or transferee of any debt or chose in action (including debts or choses in actions evidenced by judgments thereon) takes and holds the same subject to all defenses, equities, set-offs and attachments which the debtor had against the assignor or transferor. [31]

For a Further, Separate and Third Affirmative Defense, Answering Defendant Alleges:

I.

Answering defendant is informed and believes and therefore alleges that at all times material herein it was and is the law of the Republic of Germany that the courts of said Republic were not required to recognize or enforce, and need not recognize or enforce, a valid judgment of a court of the United States, but that, when any such judgment was sought to be enforced in a court of the Republic of Germany the court might and should inquire into the merits of the matter in respect of which such judgment was rendered and determine whether or not such judgment should be recognized and enforced conformably to its determination upon the merits.

II.

By reason of the foregoing facts answering defendant alleges that the within court is not required,

as a matter of comity or otherwise, to recognize or enforce the foreign judgment herein sought to be enforced, but may and should inquire into the merits of the matter in respect of which said foreign judgment was allegedly rendered.

III.

In this connection answering defendant alleges that neither it nor Universal Pictures Corporation has ever been, or is now, indebted to May-Film Aktiengesellschaft or to Joe May, in any sum whatsoever.

Wherefore, answering defendant prays judgment that plaintiffs take nothing by reason of their amended complaint on file herein, that the same be dismissed on the merits with said [32] defendant's costs incurred herein, and for such other and further relief as to the court may seem proper.

LOEB, WALKER AND LOEB,
By HERMAN F. SELVIN,
Attorneys for answering de-
defendant. [33]

State of California,
County of Los Angeles—ss.

EDWARD MUHL

being by me first duly sworn, deposes and says: that he is an officer, to wit: Assistant Treasurer of Universal Pictures Company, Inc., a corporation, answering defendant in the above entitled action;

that he has read the foregoing amended answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. Affiant further states that he is authorized to make and makes this affidavit for and on behalf of said defendant corporation.

EDWARD MUHL

Subscribed and sworn to before me this 4th day of November, 1937.

[Notarial Seal]

JOHN S. LAWTON,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 29, 1941.

[Endorsed]: Filed Nov. 6, 1937. [34]

At a stated term, to wit: The February Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 17th day of May in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable Wm. P. James, District Judge.

No. 7962-J Law

[Title of Cause.]

The plaintiffs have demurred to the amended answer of defendant Universal Pictures Company, Inc., on various grounds and have moved to strike out portions of said amended answer. The Court determines that said demurrer should be overruled, and the motion to strike denied. This ruling is to apply to all matters alleged in the said amended answer except the separate and third affirmative defense. The Court now reconsiders the former ruling affecting that defense, and concludes that prima facie validity must be ascribed to the German judgment if it is shown that it was rendered with jurisdiction and was not procured through fraud. The third affirmative defense might require practically a retrial of the facts upon which the German judgment is predicated, and the Court is not of the opinion that such a procedure is warranted in view of the general law and particularly the provisions of Sections 1915, 1916, and 1917 of the California Code of Civil Procedure. It is therefore ordered that as to the third affirmative defense as alleged the demurrer of plaintiffs should be and it is sustained on the ground that such matters referred to do not constitute a legal defense to the cause of action alleged by the plaintiffs. An exception is

noted in favor of all parties affected by this order. [35]

[Title of District Court and Cause.]

MEMORANDUM DECISION AND MINUTE ORDER

By the Amended Complaint, recovery is sought on a foreign judgment obtained on July 27, 1932, by May Film Corporation, in Germany, against the defendant for the sum of fifty thousand reichmarks. Title in plaintiffs is claimed through (1) a declaratory judgment of a German Court, dated February 1, 1935, in an action between the liquidator of May Film Corporation and Joe May, which declared Joe May to be the owner of the claim in the main action, and (2) an assignment of this judgment to a German bank as security for a loan and a guaranty of the same by one Fritz Mandl, who, by paying the debt, became, through operation of law, the assignee of the judgment. Mandl assigned to Union Bank and Trust Company of Los Angeles, who assigned to plaintiffs.

The last two assignments not being questioned, the problem calls for the determination of two questions only.

The first is: What effect is to be given to the declaratory judgment?

The contention that this judgment was one in rem or declaratory of a status and, as such, bind-

ing on persons not parties to it cannot be sustained, on the basis of either German or American law. [36]

It is a personal judgment, and not binding on the May Film Corporation.

Nor can it be given effect as "an introductory fact to a link" in the chain of plaintiff's title.

The cases which declare that a judgment determining title may be so used in a subsequent action against others who were not parties to the first action, but who claim adversely to the title, do not apply.

In such cases, the judgment is offered merely as one of a series of facts on the determination of which the controversy depends. Here, the existence of the judgment in the main action and its non-satisfaction being undisputed, the declaratory judgment becomes the proof of the ultimate fact in the litigation.

It is the whole measure of the plaintiffs' ownership—the foundation of their title. Without it, plaintiffs' predecessor in interest, Joe May, is not a creditor of the defendant entitled to the proceeds of the judgment in the main action. And, unless it can be shown that title to the original judgment against the defendant passed from May Film Corporation to Joe May, plaintiffs have no title.

Again, the defendant here is not in the position of an adverse claimant against whom it is sought to offer in evidence a judgment in an action to which it was not a party. What is attempted here is to bind the defendant by a judgment in an action to

which it was not a party and which declared Joe May to be the owner of a judgment against it, in contradiction of a prior judgment, on the same issue, in the main action, in which it was a party, and of which Joe May, as assignee pending suit, had notice.

This, in effect, is not merely to give evidentiary value to and to receive the declaratory judgment as a link in a chain of title at the behest of one claiming a superior title against one claiming adversely to the title. But it is, in reality, to give to it binding effect on the defendant, who is challenging the [37] *the* right of one claiming to be its judgment creditor under the judgment of a court in a case to which it was not a party.

This cannot be done under the law.

The other question is: What rights were acquired in the judgment by Fritz Mandl through the guaranty he gave to the Bank of Foreign Commerce of a debt of May Film Corporation, as security for which Joe May assigned the judgment in the main action?

The measure of Mandl's rights is the bank's letter to the defendant, dated February 25, 1936. This letter states Mandl's rights as those of one who has become an assignee by operation of law only. Plaintiffs treated it as such in their Complaint. Nowhere in the bank's letter, or in the Complaint, is it claimed, that the transaction was an actual assignment or an equitable assignment.

The instrument relied on by the plaintiffs as a source of the rights they claim through Mandl, not disclosing an assignment by operation of law, the plaintiffs have failed in this respect, also, to meet the burden of proving that they are the assignees of the original judgment obtained in Germany by May Film Corporation against the defendant, the amount of which it is sought to recover here.

Hence the following order:

The above entitled cause coming on to be heard before the court, without a jury, upon the issues raised by the Complaint and the Answer, and evidence, oral and documentary, having been introduced, and the cause having been submitted to the court for decision, and the court, having considered the evidence and the law and the arguments, oral and written, of counsel, now finds in favor of the defendant and orders judgment ordering and decreeing that plaintiffs take nothing by their Complaint against the defendant and that the defendant have judgment against the plaintiffs for its costs. [38]

Findings and judgment to be presented by the defendant under Local Rule 8, in accordance with conclusions herein given as grounds for decision.

Dated this 2nd day of November, 1940.

LEON R. YANKWICH,
United States District Judge.

Counsel notified.

[Endorsed]: Filed Nov. 2, 1940. [39]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on to be heard before the Court without a jury upon the issues raised by the amended complaint of the plaintiffs and the amended answer of defendant Universal Pictures Company, Inc., and evidence, oral and documentary, having been submitted to the court for its decision, and the court having considered the evidence and the law and arguments, oral and written, of counsel, and the cause having been dismissed as to defendant Universal Pictures Corporation, now makes its Findings of Fact and Conclusions of Law herein as follows: [40]

Findings of Fact

I.

Plaintiffs at all times material herein were and now are citizens of the state of California residing within said state and within the Southern District thereof. Defendant Universal Pictures Company, Inc. at all times material herein was and is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, authorized to transact and transacting business in the State of California and a citizen of the State of Delaware. The matter in controversy herein exceeds in value the sum of $3,000, exclusive of interest and costs.

II.

Defendant Universal Pictures Corporation at all times prior to its dissolution (which dissolution occurred prior to the commencement of the within action) was a corporation duly organized and existing under and by virtue of the laws of the state of New York and a citizen of said state. Prior to said dissolution defendant Universal Pictures Company, Inc. succeeded to all the property, assets and business of defendant Universal Pictures Corporation and assumed all of the latter's just and valid obligations, subject, however, to all defenses, equities, setoffs and counterclaims that might be or have been available to Universal Pictures Corporation.

III.

On or about July 27, 1932 the Kammergericht, which was a court of record of the German Reich having jurisdiction of the parties and subject-matter, rendered its judgment, in an action therein pending in which May Film A. G., a German corporation, was plaintiff and Universal Pictures Corporation was [41] defendant, condemning the defendant therein to pay to the plaintiff therein the sum of 50,000 Reichsmarks, together with interest at the rate of two percent above the discount rate of the German Reichsbank from July 1, 1926. Said judgment was affirmed on February 3, 1933 by the Reichsgericht, the Supreme Court of the German Reich, which Supreme Court had appellate juris-

diction of the cause. Said judgment became final upon said affirmance and has been final ever since. Under and by virtue of the law of the German Reich said judgment, and the claim on which it was based, were and at all times since have remained, the property of May Film A. G.; and in the German Reich and by virtue of the law of that country said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successor, only by May Film A. G., the judgment creditor.

IV.

On or about February 25, 1935 the Landegericht which was at the time a court of record of the German Reich, rendered a declaratory judgment, in an action in which the Bank For Foreign Commerce (Bank fur Auswartigen Handel A. G.), a German corporation, was plaintiff and May Film A. G. represented by its liquidator was defendant, declaring that the claim asserted in the action hereinabove in Finding III referred to was the personal property of one Joe May and not of May Film A. G. and that therefore, the assignment of said claim to said Bank for Foreign Commerce by said Joe May was legally valid. Neither Universal Pictures Company, Inc. nor Universal Pictures Corporation was a party to said action of Bank for Foreign Commerce v. May Film A. G., or had or was given any notice or knowledge thereof. Under

and by virtue of the law of the German Reich said declaratory judgment was in no way binding or conclusive upon either of the defendants herein, had no effect upon their [42] or either of their rights in respect of the claim referred to in said judgment or in respect of the ownership of said claim, and was and is not evidence as against either of the defendants herein of any of the facts or issues determined or purported to be determined therein.

V.

Under and by virtue of the law of the German Reich said Joe May (the asserted predecessor in interest of plaintiffs herein) did not acquire or succeed to the ownership of any part of the judgment rendered in the action hereinabove in Finding III referred to, or to any part of the claim upon which said judgment was based. In that connection the Court finds that the facts, as the result of which said acquisition or succession is claimed to have resulted, were and are insufficient to have the effect, under the law of the German Reich, of transferring to or vesting in said Joe May any part of said judgment or of the claim upon which it is based.

VI.

As part of its findings of fact made and entered in the action hereinabove in Finding III referred to, the Kammergericht found that the claim asserted in said action by the plaintiff therein had not been

transferred to or acquired by Joe May, which said finding, under and by virtue of the law of the German Reich, was and is a conclusive determination of that issue as between Universal Pictures Corporation and its successors on the one hand and May Film A. G. and its successors or claimed successors on the other.

VII.

Under and by virtue of the law of the German Reich none of the transactions had between or among said Joe May, Bank [43] for Foreign Commerce and one Fritz Mandl had the effect of transferring to or vesting in said Fritz Mandl any part of the judgment hereinabove in Finding III referred to or of the claim upon which it was based, even if at the time of said transactions said Bank for Foreign Commerce acquired or was vested with ownership of said judgment or claim. In that connection the Court finds that the facts, as the result of which it is claimed Fritz Mandl did acquire or succeed to said judgment or claim, did not have the effect, under the law of the German Reich of transferring to or vesting in said Fritz Mandl any part of the right, title or interest of said Bank for Foreign Commerce, if any, in or to said judgment of claim.

VIII.

No finding is made with respect to the issues raised by defendant's first or second affirmative

defenses for the reason that the findings heretofore made render unnecessary any findings on, or determination of, such issues; and no finding is made with respect to the issues raised by defendant's third affirmative defense, for the reason that prior to the trial hereof plaintiff's demurrer to said defense was sustained without leave to amend.

Conclusions of Law

1. Neither plaintiffs nor their alleged predecessors in interest (other than May Film A. G.) had or have any right, title or interest in or to any part of the judgment here sued upon or in or to any part of the claim upon which said judgment was based.

2. Plaintiffs are not entitled to enforce said judgment. [44]

3. Defendant is entitled to judgment that plaintiffs take nothing of or from defendants herein, or either of them, and that defendant Universal Pictures Company, Inc. have and recover of and from plaintiffs and each of them its costs incurred herein, including amounts paid or advanced to the official reporter.

Let Judgment be entered accordingly.

Dated: November 22, 1940.

LEON R. YANKWICH,
District Judge.

Not Approved as to form as provided in Rule 8. Reason: Incomplete, incorrect and not in accordance with the decision. Request Hearing.

ELLIS I. HIRSCHFELD,
RATZER, BRIDGE & GEBHARDT,
SAMUEL W. BLUM,
By ELLIS I. HIRSCHFELD,
Attorneys for plaintiffs.

[Endorsed]: Filed Nov. 22, 1940. [45]

In the District Court of the United States
Southern District of California
Central Division

No. 7962-Y

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Plaintiffs,

vs.

UNIVERSAL PICTURES CORPORATION, a corporation; and UNIVERSAL PICTURES COMPANY, INC., a corporation,

Defendants.

JUDGMENT

The above-entitled cause coming on to be heard before the Court without a jury upon the issues

raised by the amended complaint of the plaintiffs and the amended answer of defendant Universal Pictures Company, Inc., and evidence, oral and documentary, having been submitted to the Court for its decision, and the Court having considered the evidence and the law and arguments, oral and written, of counsel, and the cause having been dismissed as to defendant Universal Pictures Corporation, and the Court having made its Findings of Fact and Conclusions of Law herein, Now, Therefore,

It Is Ordered, Adjudged and Decreed that plaintiffs [46] take nothing of or from defendants, or either of them, by reason of their said amended complaint; and

It Is Further Ordered, Adjudged and Decreed that defendant Universal Pictures Company, Inc. have and recover of and from plaintiffs, and each of them, its costs incurred herein, including amounts paid or advanced to the official reporter herein, which said costs are hereby taxed in the sum of $80.50.

Dated: November 22, 1940.

LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed and Entered Nov. 22, 1940.

[47]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL
(Petition for Re-Hearing)

To the Honorable Leon R. Yankwich, Judge Presiding:

Comes now the plaintiffs in the above entitled cause and move this Court for an Order vacating and setting aside the decision and judgment heretofore rendered and entered herein, in favor of the defendant, Universal Pictures Company, Inc., and against the plaintiffs, and for an order granting to plaintiffs a new trial in the above entitled cause, upon the following grounds and for the following reasons:

(1) That the decision and judgment is contrary to the law in the case.

(2) That the decision and judgment is contrary to the evidence in the case.

(3) That the decision and judgment is contrary to both law and the evidence in the case.

(4) That the evidence in the case is insufficient to justify the decision and judgment.

(5) That the evidence in the case is insufficient to support the decision and judgment in the case.

(6) Errors in law occurring at the trial, apparent upon the face of the record, prejudicial to the plaintiffs, and [50] excepted to by the said plaintiffs.

(7) Newly discovered and material evidence, discovered since the trial which could not have been

obtained and produced on the trial, by the exercise of reasonable diligence.

(8) Accident and surprise which could not have been guarded against by ordinary prudence.

(9) That the evidence in the case shows that the decision and judgment should have been rendered in favor of the plaintiffs and against the defendant, Universal Pictures Company, Inc., and that the decision and judgment as entered herein is contrary to law.

(10) The Court upon the trial of the said cause, admitted improper evidence adduced by the defendant.

(11) The Court upon the trial refused to admit proper evidence offered by the plaintiffs.

(12) The Court improperly admitted evidence offered by the defendant, over objection, to the effect that the declaratory judgment of the Landgericht, dated February 1, 1935, in an action between the liquidator of May Film Corporation and the Bank for Foreign Commerce, wherein it was adjudged that Joe May, and not May Film Corporation was the owner of the judgment sued upon herein, and that Joe May's assignment to the said bank was valid, in the opinion of the witnesses produced by said defendant, was erroneous under German law and inoperative as an adjudication that the ownership of the judgment in question was in Joe May, because, said witnesses contended that the facts showing the ownership of said judgment in Joe May were, in the opinion of the said wit-

nesses, insufficient under German law to transfer the claim and judgment to Joe May. This opinion evidence was improperly admitted for the reason that the declaratory judgment admittedly was valid, binding and conclusive and final between the parties thereto, and defendant herein was not claiming title or ownership in the [51] judgment in question adverse to any party to that action, or adverse to any predecessor or successor of any part*h* thereto, and said opinion evidence therefore, was not admiss*a*ble to impeach a judgment determining ownership between the only two claimants to said judgment who were parties to the action, and who admittedly are conclusively bound thereby.

(13) The Court after receiving the opinion evidence as to the force and effect of the aforesaid declaratory judgment from the witnesses of the defendant, improperly refused to allow and admit proper evidence offered by the plaintiffs, tending to show that in fact there was a sale and assignment of the claim and judgment in question from May Film Corporation to Joe May, and that at said time, May Film Corporation had no creditors.

(14) The Court erred in holding that the aforementioned declaratory judgment constituted no evidence in this cause in favor the plaintiffs or against the defendant, solely upon the ground that the defendant herein was not a party thereto, in that the said declaratory judgment admittedly was rendered by a court of competent jurisdiction, having juris-

diction of the persons and subject matter, and was binding, conclusive and final as to the parties thereto, and since the ownership of the claim and judgment in question was in dispute only between the parties thereto, and since defendant herein was not or has not claimed any title in and to the said judgment adverse to the plaintiffs herein, or any of plaintiffs' predecessors, said judgment under the law *consituted* evidence in favor of the plaintiffs and against the defendant, to the extent that the May Film Corporation was not the owner of the judgment, that Joe May was the owner of the judgment, and that Joe May's assignment to the Bank for Foreign Commerce was valid, and the opinion evidence offered by the defendant to the legal effect of said judgment based upon hypothetical questions, was incompetent [52] and insufficient to overcome or impeach the direct adjudication as to the ownership between the only two parties claiming the same.

(15) The Court erred in admitting over objection, opinion evidence on the part of the defendant as to the written law of Germany, in that the written law of a Foreign Country is only proved by the same or copy thereof, or by the books containing the same, and cannot be proved by the oral opinion testimony of witnesses as to the written law.

(16) The Court erred in holding that there was no assignment from the Bank for Foreign Commerce to Fritz Mandl by operation of law, in that,

under 774 of the German Civil Code, the said claim and judgment was transferred to Fritz Mandl by operation of law, upon his payment to the said bank of the claim for which the said judgment and claim was given as security.

(17) The Court erred in holding that plaintiffs could only prove an assignment by operation of law from the Bank for Foreign Commerce to Fritz Mandl, when the evidence showed that there was in addition thereto, an actual assignment, and that the issue as to the actual assignment was created by the evidence without any objection on behalf of the defendant. Issues created by the evidence as just as much a part of this case to be determined, as issues created by the pleadings.

(18) The Court erred in holding that only the German law was applicable to the assignment between the Bank for Foreign Commerce and Fritz Mandl, in that the Court has stated in its opinion that the measure of Mandl's rights is the bank's letter to the defendant, dated February 25, 1936, and since the evidence shows that this letter was received by the defendant in New York, the force and effect of that letter is to be determined by the place wherein the defendant received notice, to-wit: New York, and under such circumstances, the force and effect of said letter *was* an assignment was to be determined by the law of New York, and under the law [53] of New York, the letter constituted a legal assignment. In New York, a direction by the creditor to his debtor to pay a third person the

debt owing, constitutes an assignment of the said debt.

(19) The Court erred in holding that under section 409 of the German Civil Code, the aforesaid letter and the acts in reference thereto, did not constitute an assignment of the claim and judgment sued upon.

(20) The Court erred in further holding that since the plaintiffs did not plead anything but an assignment by operation by law in respect to the assignment from the Bank for Foreign Commerce to Fritz Mandl, that no other form of assignment could be proved, in that the issue as to the actual assignment was created by the evidence without objection, and that under the new Federal Rules, great liberality is given in respect to the pleadings, and that the case should in fact be tried upon its merits irrespective of the form or the sufficiency of the pleadings.

(21) The Court further erred in holding that the judgment sued upon and the claim on which it is based were at all times, since the rendition of the judgment sued upon, the property of May Film A. G., in that under the German law and under and by virtue of a final judgment rendered by a German Court of competent jurisdiction between the parties thereto, it was conclusively adjudicated as between the two and only claimants to the said claim and judgment that the same belonged to Joe May and not to the May Film A. G., and that no competent

evidence was offered or admitted in this cause to overcome said adjudication.

(22) The Court erred in holding and finding that the judgment in question since its rendeition, has been and now is enforceable against the defendant only by the May Film A. G., in that May Film A. G. no longer was or is the owner of said judgment or claim upon which it is based, and that the same was transferred from the May Film A. G. to Joe May; firstly, by purchase and assignment, [54] and most certainly by the aforementioned declaratory judgment thereafter assigned by Joe May to the Bank for Foreign Commerce, and by the Bank for Foreign Commerce to Fritz Mandl, and by Fritz Mandl to Union Bank and Trust Co., and by the Union Bank and Trust Co. to the plaintiffs.

(23) The Court further erred in holding and finding that under and by virtue of the law of the German Reich, the said declaratory judgment had no effect upon the rights of the defendant herein in respect to the claim referred to in the judgment, or in respect to the ownership of the claim, and was not and is not evidence against either of the defendants herein of any of the facts or issues determined or purported to be determined therein, in that the said declaratory judgment under German law was admittedly binding and conclusive between the parties, and under the law of this State, admissible in evidence as a monument of title on behalf of the plaintiffs, and constitutes prima facie

evidence on behalf of the plaintiffs and against the defendant, since the defendant was not claiming ownership of the claim and judgment sued upon adverse to the plaintiffs, or any of plaintiffs' predecessors, and said defendant offered no competent evidence overcoming the adjudication of said judgment, and since by reason of the judgment, May Film A. G. could not and cannot claim ownership in and to the claim and judgment sued upon herein, Universal Pictures Company, Inc., most certainly cannot do so for and on behalf of said May Film A. G.

(24) The Court erred in holding and finding that under and by virtue of the law of the German Reich, Joe May did not acquire or succeed to the ownership of any part of the judgment sued upon herein, or to any part of the claim upon which said judgment was based, in that the aforementioned declaratory judgment admittedly, conclusively adjudicated between the May Film A. G. and Joe May, [55] the only parties claiming ownership to the said judgment and claim, that Joe May and not May Film A. G., was the owner of the claim and judgment and that any opinion evidence as to the force and effect of said judgment was and is inadmissible.

(25) The Court further erred in finding that the facts upon which it was claimed that Joe May acquired the ownership of said judgment were insufficient under German law to transfer or vest the

ownership of the judgment and the claim upon which it was based in Joe May, in that such finding was and is based upon incompetent opinion evidence and is in direct contradiction to a final judgment between the two claimants adjudicating the ownership in Joe May, to-wit, the aforementioned declaratory judgment.

(26) The Court erred in holding and finding that the Kammergericht found that the claim which is the foundation of the judgment sued upon herein was not transferred to or acquired by Joe May and that said finding was and is conclusive determination of that issue as between Universal Pictures and its successors and May Film A. G. and its successors on the other hand, in that the said Kammergericht did not in fact find that Joe May was not the owner of the said claim and that the only issue between the parties in that action, to-wit: May Film A. G. and Universal, was the issue as to whether May Film A. G. was the proper plaintiff, and that the said decision and judgment of the Kammergericht does not either under German law or under the law of California, constitute an adjudication that May Film A. G. and not Joe May in fact owned the claim, for the reason as to the rights between Joe May and May Film, A. G., the same were not adjudicated in the said Kammergericht action, since Joe May and May Film, A. G. were not adverse parties, and Universal did not claim ownership in itself, and therefore the Court could not adjudicate as between May Film and Joe May, the ownership

of the said claim, and the claimants to the ownership [56] of said claim were May Film A. G. and Joe May, and the rights as between themselves could not be litigated in an action wherein Joe May was not a party and particularly wherein Joe May and May Film A. G. were not adverse parties. Furthermore the statement in the said Kammergericht upon which the Court purports to make its finding, was and is only dictum and unnecessary to the decision, and even though the Court may construe the Kammergericht judgment as determining the ownership as of July 22, 1932, nevertheless such a finding could not constitute a conclusive finding as to the ownership of the judgment at any date thereafter, and that the declaratory judgment being conclusive between the two claimants, to-wit: May Film A. G. and Joe May, rendered at a subsequent date, would and must nullify any finding by this Court as to the issue of res adjudicata, for said declaratory judgment having occurred subsequent to the rendition of the Kammergericht judgment, would be equivalent to an assignment from May Film A. G. to Joe May as of the date of the rendition of the declaratory judgment, and such evidence would be prima facie evidence in favor of the plaintiffs and against the defendant herein as to the ownership of the judgment sued upon and the claim upon which it is based, at a date subsequent to the Kammergericht judgment.

(27) The Court further erred in holding and finding that under the laws of the German Reich,

none of the transactions between the Bank for Foreign Commerce and Fritz Mandl had the effect of transferring to or vesting in Fritz Mandl the claim and judgment sued upon herein, in that, the undisputed facts having shown that the said judgment was placed with the Bank for Foreign Commerce as security and Fritz Mandl having guaranteed the payment of the claim for which the judgment had been assigned as security, and Fritz Mandl having been called upon to pay and having paid the claim for which the judgment had been given as security, under the German [57] law, Fritz Mandl was entitled to receive by operation of law an assignment of the security as well as the debt which he was called upon to pay, and the defendant having offered no evidence showing that the facts which constitute the basis of the assignment to Fritz Mandl of the said judgment sued upon, in fact did not exist, the finding of the Court to the contrary is erroneous and contrary to the law and to the evidence.

(28) The Court erred in finding that the facts as a result of which it is claimed that Fritz Mandl acquired or succeeded to the judgment or claim*ed* sued upon herein did not have the effect under the law of *German* of transferring to or vesting in the said Fritz Mandl any part of the right, title or interest of the said Bank for Foreign Commerce in and to the said judgment or claim, in that, under the law of the German Reich, particularly Section 774 of the German Civil Code, such facts were

sufficient under said German law to transfer the claim and judgment sued upon in its entirety to Fritz Mandl, and that the authorities cited by the defendant to the effect that it was necessary for the bank to make an actual written assignment of the said judgment and claim to Fritz Mandl, was not and is not applicable herein. Furthermore the facts in the case at bar show that under Section 409 of the German Civil Code and under and by virtue of the letter dated February 25, 1936, that there was an actual*ly* assignment of the said claim to Fritz Mandl.

(29) The Court erred in failing to find upon the issues raised in defendant's first and second affirmative defenses, in that it is necessary for the Court to find upon all material issues of the case, and evidence having been offered and introduced in respect to said affirmative defenses, and the Court having announced that said evidence was insufficient to support the same, the Court should have made a finding upon said affirmative defenses, [58] and each of them, in favor of the plaintiffs and against the defendant herein.

(30) The evidence in this case is insufficient to justify and/or support the decision and judgment rendered herein, but in fact is contrary thereto in the following particulars:

(a) That there is no evidence proving or tending to prove that that portion of Finding of Fact No. III to the effect that under and by virtue of the

law of the German Reich, said judgment and the claim on which it was based, were at all times since and have remained the property of May Film A. G. and in the German Reich and by virtue of the law of that Country, said judgment at all times since its rendition has been and is now enforceable against the judgment debtor, or its successors, only by the May Film A. G., the judgment creditors, in that: the evidence in this action shows that under and by virtue of the aforementioned declaratory judgment, the judgment sued upon and the claim upon which it is based, belonged to Joe May and not to May Film A. G., and the opinion testimony of the defendant's witnesses based upon *h*pothetical questions, was incompetent to impeach said judgment, and the same does not constitute any evidence upon which the aforementioned Finding can be supported, and the aforementioned Finding is in fact, contrary to the evidence in this case. Furthermore the evidence shows that under the law of Germany, the aforementioned declaratory judgment was valid, binding and conclusive upon the parties thereto, and under such German law and judgment, the judgment and claim in question belonged to Joe May and not May Film A. G. and could be enforced by the owner thereof by obtaining from the proper Court the so-called execution clause.

(b) That there is no evidence in this case provin*d* or tending to prove that that portion of

Finding No. IV to the effect that under and by virtue of the law of the German Reich, said [59] declaratory judgment had no effect upon the rights of the defendant in respect to the claim referred to in said judgment, or in respect to the ownership of said claim, and was and is not evidence as against the defendant herein, or any of the facts *of* issues determined or purported to be determined therein, in that, the purported evidence attempting to support such a *find* is incompetent opinion evidence attempting to show that the said judgment was erroneous as a matter of law, notwithstanding that the judgment admittedly was binding, conclusive and final as between the parties thereto, and since as the evidence shows that the defendant herein at no time claimed ownership to the judgment adverse to the plaintiffs or any of plaintiffs' predecessors, said defendant could not show that as*b* between the claimants to the ownership of said judgment that the said judgment was erroneous, and that is in effect what the defendant attempted to show by its opinion testimony, and the aforementioned Finding is in fact contrary to the evidence in the case, to-wit: the adjudication found in the aforementioned declaratory judgment.

(c) There is no evidence proving or tending to prove Finding No. V, reference to which is hereby respectfully made, in that, the only purported evidence offered in respect thereto by defendants is opinion evidence based upon hypothetical questions and not upon the facts in the case, and attempts

to impeach an admittedly final and conclusive judgment between the parties to the said judgment, to-wit: the only claimants as to the ownership of the judgment sued upon and the claim upon which it is based, and since said Finding is contrary to the adjudication found in the declaratory judgment, it is contrary to the evidence in this case.

(d) There is no evidence proving or tending to prove that Finding VI, reference to which is hereby respectfully made, in that no evidence whatsoever was offered by the defendant to prove or [60] tending to prove that the said judgment of the Kammergericht referred to therein was and is conclusive determination as between Universal Pictures Corporation and its successors on the one hand and May Film A. G. and its successors on the other hands, as to the ownership of the claim sued upon in said action, and the judgment itself shows that the sole issued determined by the Kammergericht affecting ownership of the claim was that the plaintiff, May Film A. G. was the proper plaintiff and did not go any further, and could and did not affect the ownership of the claim as between the claimant, Joe May and May Film A. G., for Joe May was not a party thereto, and if in any way connected with said action, was not an adverse party to May Film A. G., and in order to constitute res adjudicata, it would have been necessary for the Kammergericht to have Joe May and May Film A. G. adverse parties in order to determine their rights as to the ownership of the claim; it was, how-

ever, not necessary for the Kammergericht to have Joe May a party to said action in order to determine that May Film could continue with the action as the proper party plaintiff, and the evidence further shows that the said Kammergericht judgment was not conclusive and res adjudicata as between Joe May and May Film A. G. respecting the ownership of the judgment sued upon and the claim upon which it is based, in that the evidence shows that under the German law and by the aforementioned declaratory judgment, it was determined that the Kammergericht judgment was not res adjudicata as to the issue of ownership between May Film A. G. and Joe May, and that in an action wherein their respective rights were adjudicated and wherein Joe May and May Film A. G. were adverse parties, it was conclusively adjudged under German law that Joe May and not May Film A. G. was the owners of said judgment and claim; therefore the aforementioned Finding is also contrary to the evidence.

(e) There is no evidence proving or tending to prove Finding No. VII, reference to which is hereby respectfully made, in [61] that defendants offered no testimony whatsoever to refute plaintiffs' claims that the aforementioned claim and judgment was assigned to the Bank for Foreign Commerce as security for a debt of May Gilm A. G. by its owner, Joe May; that Fritz Mandl became a surety upon said obligation of Joe May and was called upon and did pay the obligation and that therefore

under the German law, Fritz Mandl was entitled to and did succeed to all the rights, including the ownership of the judgment in question, which the evidence showed to be the facts, and the evidence further showed that there was in fact an assignment from the Bank for Foreign Commerce to Fritz Mandl, and that the letter in question constituted an assignment in fact, both under German and under American law; therefore, the aforementioned Finding is also contrary to the evidence in the case.

(31) The said decision and judgment herein is contrary to law in that:

(a) The failure of this Court to hold that the aforementioned declaratory judgment constituted evidence in favor of the plaintiff and against the defendant is contrary to law, in that under the law of this State and of *German*, the aforementioned judgment was final, binding and conclusive between the parties thereto and constituted prima facie evidence in favor of the plaintiff and against the defendants herein in support of the plaintiff's foundation or chain of title.

(b) The Court's failure to hold that under the facts in the case at bar, there was an assignment by operation of law from Bank for Foreign Commerce to Fritz Mandl as provided by the German law, is contrary to law.

(c) The Court's failure to hold that there was in fact an actual assignment from Bank for Foreign Commerce to Fritz Mandl, is contrary to law, both

under the German and American law, includ- [62] ing that of the State of New York and California.

(d) The Court's failure to hold that the Kammergericht judgment was not res adjudicata upon the issue of the ownership of the judgment herein and the claim upon which it is based, is contrary to both the German and American law.

(e) The Court's failure to find that the transaction had between Joe May, Bank for Foreign Commerce and Fritz Mandl, and the judgment sued upon herein or the claim upon which it was based, had the effect of transferring to or vesting in Fritz Mandl the right, title and interest in and to the said judgment or claim sued upon, is contrary to the law of Germany.

(f) The Court's failure to hold that there was in fact an actual assignment from the Bank for Foreign Commerce to Fritz Mandl is contrary to law, both of the law of Germany and of the United States.

(g) The Court's holding that the plaintiffs or any of the predecessors in interest, other than May Film A. G., have any right, title or interest in or to the judgment sued upon herein, or in or to the claim upon which said judgment is based, is contrary to law of both *German* and the United States and of this State.

(h) The Court's failure to render judgment in favor of the plaintiffs and against the defendant is contrary to law.

(32) In the event a new trial is granted herein, that plaintiffs will seek permission of the Court to amend their proceedings to allege not only an assignment by operation of law, but in fact, actual assignments from the Bank for Foreign Commerce to Fritz Mandl, and counsel for plaintiffs is informed and believes, and upon such information and belief states that plaintiffs will be able to obtain actual assignments from each and every predecessor in interest of the judgment and claim*ed* sued upon herein.

(33) The Court erred in permitting the defendant to [63] introduce into evidence the so-called judgment between U. F. A. and May Film A. G., upon the theory that the same was foundation for a writ of attachment issued in said action against the defendant's predecessor*y*s herein, and since the evidence showed that the said writ of attachment was ineffectual for any purpose, the allegations and statements contained in said judgment, to which neither Joe May or any of the successors in interest were parties, was highly prejudicial in that said statements were made therein in respect to Joe May and his successors, which could not be refuted by the said Joe May or any of his successors, since they were not parties thereto.

(34) That by reason of the foregoing, the plaintiffs respectfully represent that it would be inequitable to permit the said decision and judgment rendered herein to stand, and respectfully pray that

said decision and judgment be reviewed, reversed, vacated and set aside, and for such other and further relief as may be just and proper*ty* in the premises.

This motion will be based upon the matters herein contained, upon the minutes, records and files of said action, and upon the affidavits hereinafter to be served and filed herein, and upon the points and authorities to be served and filed herein.

Dated this 2nd day of December, 1940.

ELLIS I. HIRSCHFELD,
H. A. GEBHARDT,
SAMUEL W. BLUM,
By SAMUEL W. BLUM,
Attorneys for Plaintiffs.

[Endorsed]: Filed Dec. 2, 1940. [64]

[Title of District Court and Cause.]

State of California
County of Los Angeles—ss.

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

Ellis I. Hirschfeld, being first duly sworn on oath, deposes and says:

That he is an attorney at law, duly licensed to practice in all of the courts of the State of California, as well as the above entitled Court, and that as such attorney in the above entitled Court he appeared as attorney for the plaintiffs in the above

entitled action. That said action was based upon transactions and events which took place in Germany beginning in 1924, with subsequent litigation thereon which finally terminated shortly prior to the commencement of the above entitled action. That in said transaction there was, among other things, an assignment of a claim from the Bank of Foreign Commerce to one Fritz Mandl. That in the preparation of this case affiant associated with him one Dr. H. A. Gebhardt, for the reason that affiant was informed and believed that said Gebhardt was, in addition to being a lawyer authorized to practice in the Courts of the State of California, familiar with German law. Affiant was informed and believes that said Gebhardt was at said time and still is acting as general [65] counsel for the Los Angeles offices of the German Consulate, and because of the position that said Gebhardt occupied, affiant believed that said Gebhardt could and would furnish affiant with such law and interpretations thereof existent in Germany at the times applicable in the above entitled action. That among other things said Gebhardt advised affiant and affiant relied thereon, that under the facts and circumstances of this case, the aforesaid assignment from the Bank for Foreign Commerce to Fritz Mandl was an automatic assignment under the facts and circumstances according to German law, and was known as "an assignment by operation of law", as evidenced by Section 774 of the German Code of Law, applicable to such transactions.

Affiant further states that said Fritz Mandl had left Germany and at the time affiant had been employed in this action said Fritz Mandl was residing in Austria. That shortly thereafter Austria became a part of Germany, under such conditions as made it necessary for Mr. Mandl to leave the country. Mr. Mandl was not heard of for a long time, until it was discovered that he was in South America and was making a short trip to New York. Immediately upon ascertaining said facts, affiant established communications with said Mandl and was advised that his attorney in New York was one Mr. Leo Taub. Affiant communicated with said attorney Leo Taub and asked him to make arrangements to take the deposition of Mr. Mandl (pursuant to stipulation between counsel for defendant and affiant) and said Taub was instructed by affiant to obtain from Mandl all information respecting the subject matter of this litigation that he could. Your affiant states that he was advised and believed that the Bank for Foreign Commerce was no longer in existence in Germany and that any information that could be ordinarily obtained from a bank was no longer available, as the only evidence of the existence of said bank was the fact that its assets [66] have been sequestered by a liquidator and that none of the officers, either known or unknown, were available. Affiant further attempted to communicate with the attorneys for plaintiffs' original assignors in Germany, and upon attempting to obtain information as to the whereabouts your affiant was informed

by the sources from whom he made inquiry that because some of the lawyers were Jewish that they had not been in favor with the Government and their licenses had been cancelled and they could not be located. Two of the former attorneys were ascertained by your affiant by information furnished to him, to be dead. Your affiant therefore had no source of information during the preparation for the trial other than said Mandl; a Mr. May, who lived in Los Angeles and who was working for one of the defendants at the time and was a rather unwilling witness, particularly in view of the fact that defendants' counsel had made mention of the fact that said May appeared to be too interested in the case and that the defendant was unwise in keeping him on the payroll. Shortly after said comments, said May was no longer working for said defendant and gave further information to affiant. Other witness whom affiant attempted to gain information fro*m*was one E. H. Goldstein, who also resided in Los Angeles and who stated that he still owned shares in one of the defendant companies. The only other witness available who could give information was one Keller, who knew nothing about the bank transfer.

Upon receiving notice that the deposition of Mandl had been taken, affiant was notified by Mandl's New York attorney, said Taub, that Mr. Erich Lenk was in New York City and that Mr. Lenk was a former officer of the Bank. Thereupon, pursuant to stipulation between counsel for the

parties the deposition of Lenk was ordered taken.

As will be disclosed by the Court records, the depositions of both Mandl and Lenk did not come to Los Angeles, nor did any [67] copy thereof come to your affiant until shortly before the trial, the deposition of Mandl preceding the deposition of Lenk by a few days. All during the time between the taking of the deposition and the delivery or furnishing of the deposition to affiant, your affiant most diligently and energetically attempted to get said Taub to complete the deposition and get the same sent to Los Angeles. That delay of all kinds occurred without fault of plaintiff or affiant. That the reason for the delay is set forth in the affidavit of said Leo Taub, attached to this affidavit.

At this point affiant begs to draw the attention of the Court to affiant's opening remarks on the date the case was called for trial, which remarks in substance stated that the depositions had just arrived and that affiant had not had a chance to examine them, and further the Court will recall that one of the depositions was not even then in the files and that the clerk of the Court subsequently left the courtroom and found the deposition in a place other than in the files. Affiant further states that the Honorable Trial Court stated that the case had taken entirely too long to get to trial and that the case should have been disposed of long ago and that it was the longest pending case on the calendar and that the calendar should be cleaned up. That said

remarks of the Court were accepted by affiant as being tantamount to an order to proceed.

That affiant further states that at all times during the trial and prior thereto he was not advised by anybody, nor did he have any then known means of ascertaining whether there had ever been an actual assignment of the claim in addition to the letters and testimony that had been submitted in evidence. That shortly after the judgment of the Court had been rendered, affiant advised said May and further advised one Pinner, a German attorney who had been an attorney for the beforementioned Bank, of the judg- [68] ment of this Honorable Court. It will be remembered by this Houorable Court that said Pinner's presence became first known during the trial of this action. Such statement was made to this Honorable Court at the time of trial. Affiant further states that Joe May notified Mandl that one of the reasons given by the Court for its decision was the absence of a written assignment from the Bank to Mandl. That thereafter Mr. May received a letter from Mr. Lenk advising him that the Bank had in fact, subsequent to the time the assignment by operation of law had been effected, made a written assignment of the claim and judgment involved herein to said Mandl. Thereupon your affiant immediately communicated with Mr. Taub in New York to ascertain if in fact such a written assignment had been made. That in an affidavit filed concurrently herewith, by Erich W. Lenk, Mr. Lenk

states that a written assignment of the claim and judgment involved herein was in fact made and executed by the Bank for Foreign Commerce to Fritz Mandl, the terms of which are set forth in said affidavit of said Lenk.

Affiant further states that this information as to an actual written assignment having been made was made known to affiant for the first time by said Joe May after he had received the letter from Lenk above referred to. Affiant further states that since he did not suspect or know at any time during the trial of the action or prior thereto of the existence of any written assignment as described in Lenk's affidavit, filed concurrently herewith, he could not have known or did not direct the New York attorney Lenk's deposition to develop that information in the deposition, and the reason why Lenk did not disclose the same prior thereto is disclosed in his affidavit. Affiant further states that he believes that said New York attorney, Taub, could not or should not have known of the existence of a written assignment because said Taub knew nothing about the case other than what information had been furnished by affiant. [69]

That the existence of the written assignment upon a new trial will undoubtedly produce a different result, and that affiant is informed by said Lenk, and as appears in the affidavit of said Lenk, he, said Lenk, states that if this Honorable Court will grant a new trial, or that if permission is granted

to take additional evidence, that he will appear in person and testify to the facts as set out in his affidavit.

Affiant alleges that the preparation of this particular type of case was one of extreme difficulty, due to the conditions existing in Europe and due to the spreading to all corners of the earth of the various persons who might or could have known all of the facts, and begs the Court to consider, among other things, the fact that these circumstances took place in a country undergoing dynamic and rapid changes, where attorneys were disbarred, persons addresses becoming unknown, others forced to flee the country, leaving their belongings and documents in the hands of whoever may find them. That at the time of leaving the country witnesses, including said Mandl, had personal safety on their minds, together with the worry of re-establishing themselves elsewhere, and that with all of these conditions together with time, plus the known faultiness of the memory of man, together with the lack of legal knowledge on the part of the layman, it could well be understood why Mandl would not have recalled or volunteered the information as to a written assignment. Affiant further states that the facts which have been developed by the affiants filed concurrently herewith, were not known by the plaintiffs or by the Union Bank and Trust Company of Los Angeles.

Further affiant sayeth not.

ELLIS I. HIRSCHFELD

Subscribed and sworn to before me this 2nd day of January, 1941

(Notarial Seal) HARVEY HIRSH

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 2, 1941 [70]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of New York
City of New York
County of New York—ss.

Leo Taub, being duly sworn, deposes and says:

That he is an attorney and Counsellor-at-law duly admitted to practice in the Courts of the State of New York.

That some time during the early part of April, 1940, deponent received a stipulation authorizing the taking of the deposition of Fritz Mandl, a witness on behalf of the plaintiffs herein, which deposition was to be taken in the City and State of New York.

Action thereupon, deponent examined the said witness and his deposition was duly prepared and sworn to on or about the 18th day of April, 1940, before the Notary Public appointed by the Court herein under the terms of the stipulation. [71]

At about that time, deponent corresponded with the plaintiff's attorney in Los Angeles, California

regarding the taking of the deposition of another witness, Dr. Erich Lenk.

Deponent held the forwarding of the deposition of the witness, Fritz Mandl, because certain Exhibits had been marked in evidence or had been identified in connection with the deposition of Fritz Mandl and the same Exhibits were needed in the taking of the deposition of the other witness, Dr. Erich Lenk.

Subsequently thereto, deponent received a stipulation authorizing him to take the deposition of the witness, Dr. Erich Lenk.

However, the address of such Dr. Erich Lenk was not known to deponent and he thereupon communicated with Mr. Fritz Mandl who at that time had returned to Buenos Aires, Argentine, his place of residence.

At about the same time, deponent undertook several professional trips to various Central American countries including Haiti and Cuba and it was for that reason that the taking of the deposition of the witness, Dr. Erich Lenk, was delayed.

Deponent then received an urgent letter from the plaintiff's attorney which stated that the case had been set for trial within a short period of time and deponent then immediately prepared the deposition of the witness, Dr. Erich Lenk and forwarded both the Mandl and Lenk depositions, together with the Exhibits to the Court. [72]

The above stated facts are the reasons why the two depositions of Mr. Fritz Mandl and Dr. Erich

Lenk referred to herein were not sent to the Court previously.

LEO TAUB

Sworn to before me this 17th day of December, 1940.

EDWARD H. SNYDER

Notary Public Kings Co. Clk's No. 479, Reg. No. 2531 N. Y. Co. Certificates filed in Clk's No. 1320, Reg. No. 2S803.

Commission expires March 30, 1942.

No. 83212

State of New York
County of New York—ss.

I, Archibald R. Watson, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, do hereby certify, that Edward H. Snyder whose name is subscribed to the annexed deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public acting in and for said County, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's office of the County of New York a certified copy of his appointment and qualifications as a Notary Public for the County of Kings with his autograph signature; that as such Notary Public he was duly authorized by the laws of the State of New York to protest notes, to take and certify depositions, to

administer oaths and affirmations, to take affidavits and certify the acknowledgment or proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this State. And further, that I am well acquainted with the handwriting of such Notary Public, or have compared the signature of such officer with his autograph signature filed in my office, and believe that the signature to the said annexed instrument is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court and County, this 24 day of Dec., 1940.

[Seal] ARCHIBALD R. WATSON

County Clerk and Clerk of the Supreme Court, New York County.

[Endorsed]: Filed Jan. 2, 1941. [73]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of New York
City of New York
County of New York—ss.

Erich W. Lenk, being duly sworn, deposes and says:

That he resides at 1781 Riverside Drive, New York City.

That deponent is the same person who heretofore executed a deposition in the above entitled action.

Deponent obtained his degree of "Dr. Jur." in the City of Innsbruck, Austria, during the year 1922.

From the year 1927 and until April, 1937, deponent was connected with the "Bank *d*uer Auswaertigen Handel, Aktiengesellschaft" in the City of Berlin, Germany. The capacities of deponent, while connected with the said bank were at different times, and successively the following:—Assistant to the secretary; Vice-President (Prokurist); Manager of the Legal and Loan Departments; Member of the Presidential Committee (Vorstandsmitglied); and finally, sole Liquidator.

During the said period of connection with the above mentioned bank, deponent was in charge of, and fully familiar with a [74] transaction which concerned Mayfilm, A. G., Joe May, Julius Aussenberg, Mrs. Mia May and Fritz Mandl.

This transaction took the following form:—In the latter part of the year 1930, the above mentioned bank granted a loan of approximately 80,000.00 to 100,000.00 R.M. to the Mayfilm A. G. in Berlin. This loan was secured by an acceptance for 100,000.00 R.M. signed by Joe May, Director of Mayfilm Corporation, and endorsed by himself, his wife, Mia May, and the other Director of the corporation, Julius Aussenberg, and a written guaranty by Fritz Mandl.

In addition, the bank, received as collateral several items of personal property, among which was

a claim held by Joe May against Universal Pictures Corp. in the United States. The major part of the loan was not paid when due and the bank exercised its rights as against the guarantor, Fritz Mandl, and charged his account with the bank, with the outstanding amount of the loan plus interest.

The loan having been satisfied, the bank transferred and assigned to Fritz Mandl all of the collateral which it held as security for the loan including the claim against Universal Pictures.

This was done in the following manner:—On the 26th day of February, 1936, I in my official capacity advised Universal pictures that by reason of Mr. Mandl's satisfaction of the obligation to the bank, he, Mr. Mandl, had become subrogated to the bank's claim against Universal Pictures Corp. This letter was sent by me on behalf of the bank and was countersigned by another officer of the bank as was customary with this type of document. (This letter is marked plaintiff's "Exhibit I")

This letter was sent to Universal to put them on notice as to the disposition of the claim pending receipt of permission to execute a written assignment. This was done to prevent Universal from paying out to any other person. It was my belief, based upon the legal [75] opinion of the bank's attorney, that Mr. Mandl succeeded automatically to the bank's interest in the claim against Universal Pictures by virtue of Par. 774 B.G.B. However, it was thought best to secure in addition, an official per-

mission of the Government's Foreign Exchange Control Office and then to execute a written assignment to Mr. Fritz Mandl.

I, personally, acting in my capacity as a member of the Presidential Committee, (Vorstandsmitglied) instructed Dr. Hans Schoene, an expert in foreign exchange matters, to apply on behalf of the Bank, to the German Foreign Exchange Control Office (Devisenstelle) at Berlin, to obtain official permission for the execution of the formal transfer and assignment to Mr. Fritz Mandl of the claim against Universal Pictures.

This permission was obtained shortly after the notice had been sent to Universal Pictures and in pursuance of such notice, I prepared the formal assignment to Mr. Mandl. This was embodied in a letter.

The following is substantially the contents of that letter to the best of my recollection:—

> As collateral for our claim against the May Film A. G. Berlin, Mr. Joe May has assigned to our bank on February 9th, 1933, a claim against Universal Pictures Corp., (New York) a claim of R.M. 50,000, plus 2% interest above the discount rate of the Reich Bank.
>
> Whereas, the said loan was not fully repaid when due, and whereas, we have invoked your guaranty for our claim against the May Film A. G. regarding the principal plus interest, and whereas you have satisfied our claim under

your guaranty, we herewith transfer and assign (with permit of the Foreign Exchange Control Office, Berlin No....., Dated.....) this claim against Universal Pictures Corp. (New York) to you.

Signed.

This letter *as* signed by me on behalf of the bank and was countersigned by another officer of the bank as was customary with this type of document and it was notarized and documentary stamps affixed. [76]

This letter contained the number and date of the permit issued by the Foreign Exchange Control Office.

My recollection of the contents of this letter is based upon the following:— The bank at all times used a form of transfer and assignment of which the foregoing is a copy. Since I know of my own knowledge that such a transfer and assignment was executed, I can readily affirm that the foregoing constitutes in substance the instrument by which the claim was transferred and assigned.

Deponent knows of his own knowledge that a copy of the written assignment which was mailed to Fritz Mandl was retained by the bank in its files but I do not know if it is still there. In view of the subsequent liquidation of the bank, it will be impossible to obtain that copy. However, I do know that such a document was in fact executed by the bank; that a copy thereof was originally retained by the bank

and that the foregoing is a true and accurate statement of the contents.

I did not testify concerning the written assignment as I was at no time asked about it upon my deposition. I merely answered questions put to me. At no time prior thereto did I have an opportunity of discussing the facts with Mr. Taub, who was himself unacquainted with the details of the transaction.

Deponent hereby expresses his willingness to appear before this Honorable Court if a new trial is granted or if permission is granted to take additional evidence, and to testify in person to the facts as stated hereinabove.

ERICH W. LENK

Sworn to before me this 28th day of December, 1940.

EDWARD H. SNYDER

Notary Public Kings Co. Clk's No. 479. Reg. No. 2531 N. Y. Co. Clk's No. 1320, Reg. No. 2S803.

Commission expires March 30, 1942.

[Endorsed]: Filed Jan. 2, 1941. [77]

[Title of District Court and Cause.]

State of California
County of Los Angeles—ss.

AFFIDAVIT OF HERMAN F. SELVIN IN OPPOSITION TO MOTION FOR NEW TRIAL

Herman F. Selvin, being first duly sworn, deposes and says:

I am an attorney-at-law duly licensed to practice in the courts of the state of California and in the above-entitled court. I am a member of the firm of Loeb and Loeb, attorneys for defendant Universal Pictures Company, Inc. herein and as such I have been in charge of the preparation and defense of the within action. [78]

1. The real party in interest in the within litigation, that is, the person having full control of the litigation and the person to whom the proceeds thereof, if any, would be payable is Fritz Mandl, being the same Fritz Mandl referred to in the affidavits in support of motion for new trial. This statement is based upon statements made to me by Mr. Ellis I. Hirschfeld, attorney for plaintiffs, and upon correspondence addressed to the defendant in the within action by Mr. Hirschfeld, and upon my personal knowledge of the situation. In that regard it should be noted that plaintiffs are assignees of the Union Bank & Trust Co. of Los Angeles, which in turn is an assignee of Fritz Mandl. The interest of the Union Bank & Trust Co. of Los Angeles, and therefore that of the plaintiffs, was purely that of an assignee for purposes of collection, as is indi-

cated by a letter dated November 25, 1939 addressed by Mr. Hirschfeld to Mr. Edward Muhl, an employee of the defendant, in which letter the following statement appears:

> "For your further information, the instructions from Mr. Mandl to the Union Bank provides (sic) simply for the payment to me of the attorney's fees in the action in the event we are successful, and for the remitting to him of the balance."

2. In a letter addressed to the defendant by Mr. Hirschfeld dated March 26, 1936, the following statements, among others, are made:

> "This is to advise you that we, the undersigned represents Mr. Fritz Mandl who has instructed us to file this claim with you. Mr. Mandl by proper assignment is the owner of a judgment rendered July 27, 1932 by the Kammergericht (District Court of Appeal in Berlin) No. 25U5849/30, further numbered 74 '0'590/26, which judgment was affirmed [79] in the Reichsgericht (Supreme Court of Germany) on February 3, 1933, No. VII 324/1932 . . ."

It thus appears that several years prior to the trial of the within action knowledge of an assignment of the judgment to Mr. Mandl was had by the parties in interest, notwithstanding which knowledge no attempt to prove any such assignment was made at the trial of the cause, but reliance was had solely upon an alleged transfer by operation of law.

3. Under date of April 1, 1940 I entered into a stipulation with counsel for plaintiffs for the taking of the deposition of Fritz Mandl in New York. That deposition was taken on or about April 15, 1940. On or about April 16, 1940 I was requested by counsel for plaintiff to stipulate to the taking of the deposition of an additional witness in New York, and on May 1, 1940 I signed a stipulation for the taking of said deposition, it being then disclosed that the witness in question was Doctor Erich Lenk, and immediately forwarded that stipulation to counsel for plaintiffs. I have no information as to why said deposition was not taken sooner except that I do know that is was not delayed at the request of defendant or any of defendant's counsel.

4. With respect to the persons referred to in Mr. Hirschfeld's affidavit as sources of information, it should be noted that Mr. Hirschfeld was apparently in communication with Mr. Mandl several years before the trial of the action, as indicated by the correspondence above referred to and was in direct communication with him at the time of the taking of his deposition in April, 1940.

Since the pleadings in the within action raised an issue as to assignment of the claims sued upon, it is quite apparent that a simple question to Mr. Mandl would have diclosed [80] the information which it is now claimed was disclosed only after the judgment in the case had been entered.

With respect to Mr. May who is the Joe May frequently referred to in the testimony in this case,

it should be noted that Mr. May at various times during the pendency of the cause has been employed by the defendant and at no time was his employment severed by reason of Mr. May's connection with or interest in the present litigation. In fact Mr. May was actually employed by the defendant at the time the within cause was tried, notwithstanding which employment Mr. May was able to and did attend every session of court at which the case was heard and remained present in court throughout the entire session. I can and do state from my personal observation during the trial that Mr. May was frequently and almost constantly in communication with plaintiffs' attorneys in the court room during the trial of the cause. I can and do further state that notwithstanding Mr. May's employment by the defendant, Mr. May consistently refused to discuss the subject matter of the within litigation with any officer or representative of the defendant or with the defendant's attorneys, but would carry on such discussions with the plaintiffs' attorneys. From these facts it is quite evident that plaintiffs had ample opportunity, on many occasions long prior to the trial of the within cause, as well as during the trial of the within cause, to obtain from Mr. May any information or knowledge that he might have had with respect to the issues involved.

Mr. E. H. Goldstein, referred to in the affidavit of Mr. Hirschfeld, was at one time an officer of the defendant's predecessor corporation. Mr. Goldstein

was interviewed by counsel for plaintiffs and was actually placed under subpoena to appear and testify at the trial, from which attendance he was excused by plaintiff's counsel. Mr. Goldstein, in response to [81] inquiries of defendant's attorneys, stated that he had no knowledge of the matters involved in the within litigation other than a vague recollection that there was some difficulty at the time he was connected with the defendant's predecessor, over a contract in Germany.

The person Keller referred to in the affidavit of Mr. Hirschfeld is unknown to me.

5. Mr. Pinner, referred to in the affidavit of Mr. Hirschfeld, it will be recalled, was personally present at the trial of the within cause and testified as a witness on behalf of plaintiffs. He was examined on both direct and cross-examination with respect to the alleged transfer of the claim involved in the action from the Bank for Foreign Commerce to Mandl and testified at length to the practice of the Bank in such cases and to his personal connection with various phases of the transaction involved in this action. It will also be recalled that he testified that in his opinion the document relied upon by plaintiffs as evidencing a transfer by operation of law was in and of itself an assignment sufficient to transfer the claim regardless of any transfer by operation of law. It therefore appears that any information or knowledge which Mr. Pinner might have had with respect to the transaction could readily have been ascertained at a time when his tes-

timony to that effect could have been produced at the trial of the cause.

HERMAN F. SELVIN

Subscribed and sworn to before me this 6th day of January, 1941.

[Notarial Seal] ELLOWENE EVANS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jan. 25, 1941. [82]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It is hereby stipulated by and between the plaintiffs, John Luhring and Margaret Morris, and the defendant, Universal Pictures Company, Inc., a corporation, by and through their respective counsel, as follows:

(a) That plaintiffs' motion for a new trial in the above entitled action now set for hearing on the 30th day of December, 1940, at the hour of 10:00 A. M., in the Courtroom of the Honorable Leon R. Yankwich, shall be continued to the 20th day of January, 1941, at the hour of 10:00 A. M., of said day, or as soon thereafter as counsel may be heard, without further notice or motion.

(b) That plaintiffs may have to and including the 30th [83] day of December, 1940 within which to

serve and file points and authorities in support of plaintiffs' motion for a new trial.

(c) That plaintiffs may have to and including the 30th day of December, 1940 within which to serve and file any affidavits in support of plaintiff's motion for a new trial.

(d) That pursuant to the terms of this stipulation, that the above entitled Court be and is hereby authorized to make its order in accordance herewith.

Dated, December 23, 1940.

ELLIS I. HIRSCHFELD
H. A. GEBHARDT
SAMUEL W. BLUM
By ELLIS I. HIRSCHFELD
Attorneys for plaintiffs.
LOEB AND LOEB
By HERMAN F. SELVIN
Attorneys for defendant, Universal Pictures Company, Inc.

It is so ordered:

Dated, December 23, 1940.

LEON R. YANKWICH
Presiding Judge.

[Endorsed]: Filed Dec. 26, 1940. [84]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE POINTS AND AUTHORITIES AND CONTINUING HEARING

It is hereby stipulated by and between the counsel for the respective parties hereto:

1. That plaintiffs' motion for a new trial in the above entitled action now set for hearing on the 20th day of January, 1941, at the hour of 10:00 a. m., in the court room of the Honorable Leon R. Yankwich, shall be continued to the 3d day of February, 1941, at the hour of 10:00 a. m., or as soon thereafter as counsel may be heard, without further notice or motion;

2. That defendant Universal Pictures Company, Inc. may have to and including January 20, 1941 within which to serve and file its memorandum of points and authorities in opposition to plaintiffs' motion for a new trial.

Dated: January 14, 1941.

ELLIS I. HIRSCHFELD
H. A. GEBHARDT
SAMUEL W. BLUM
By SAMUEL W. BLUM
Attorneys for Plaintiffs

LOEB AND LOEB
By HERMAN F. SELVIN
Attorneys for defendant Universal Pictures Company, Inc.

So ordered.

YANKWICH, J.

[Endorsed]: Filed Jan. 16, 1941. [85]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto through their respective counsel that the hearing in the above entitled matter now set for February 3, 1941 before the Honorable Leon R. Yankwich, shall be continued to the 17th day of February, 1941, at the hour of 10:00 o'clock, A. M., without further notice or motion, and that the plaintiffs may have to and including the 10th day of February, 1941 within which to serve and file reply points and authorities and affidavits in support thereof, if they so desire.

Dated this 31st day of January, 1941.

ELLIS I. HIRSCHFELD
H. A. GEBHARDT
SAMUEL W. BLUM
By ELLIS I. HIRSCHFELD
Attorneys for Plaintiffs
LOEB AND LOEB
By HERMAN F. SELVIN
Attorneys for Defendant Universal Pictures Company, Inc.

It is so ordered:

LEON R. YANKWICH
Judge of the above entitled Court.

Dated, January 31, 1941.

[Endorsed]: Filed Jan. 31, 1941. [86]

At a stated term, to wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of February in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 7962-Y Civil

[Title of Cause.]

This cause coming before the Court for hearing plaintiff's motion for a new trial is now continued to February 17, 1941, for the said hearing, pursuant to stipulation and order signed January 31, 1941. [87]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the plaintiff and the defendant Universal Pictures Corporation, Inc., by and through their respective counsel, that plaintiff's motion for a new trial in the above entitled action, now set for the 17th day of February, 1941 at the hour of 10:00 o'clock A. M., in the courtroom and before the Honorable Leon R. Yankwich, is hereby continued to the 24th day of February, 1941 at the hour of 10:00 o'clock A. M., without further notice or motion.

Said continuance is requested on account of illness of counsel.

Dated: February 14, 1941.

ELLIS I. HIRSCHFELD
H. A. GEBHARDT
SAMUEL W. BLUM
By SAMUEL W. BLUM (G.G.)
Attorneys for Plaintiffs

LOEB AND LOEB
By HERMAN F. SELVIN
Attorneys for Defendant Universal Pictures Company, Inc.

It is so ordered:

LEON R. YANKWICH
District Court Judge

[Endorsed]: Filed Feb. 14, 1941. [88]

At a stated term, to wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 24th day of February in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 7962-Y Civil

[Title of Cause.]

This cause coming before the Court for hearing plaintiffs' motion for a new trial; Ellis I. Hirschfield, Esq., and Samuel W. Blum, Esq., appearing as counsel for the plaintiff; Herman F. Selvin, Esq., appearing as counsel for the defendant; and G. M. Fox, Court Reporter, being present and reporting the testimony and the proceedings:

Attorney Blum presents motion.

At 12:20 o'clock P. M. it is ordered that the cause be, and it hereby is, continued to 1:30 o'clock P. M. for further proceedings. At 1:30 o'clock P. M. court reconvenes herein, and all being present as before,

At 3:25 o'clock P. M. Attorney Selvin argues in opposition to motion; at 4:04 o'clock P. M. Attorney Blum argues in rebuttal; at 4:52 o'clock P. M. Attorney Hirschfield argues further in rebuttal; and

at 4:56 o'clock P. M. Attorney Selvin argues further. It is ordered that the cause as to the said motion be submitted. [89]

At a stated term, to wit: The February Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of March in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Leon R. Yankwich, District Judge.

No. 7962-Y Civil

[Title of Cause.]

This cause having been presented and argued, and submitted; and the Court having considered the arguments and the law, the motion of plaintiffs for a new trial is denied. [90]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant Universal Pictures Company, Inc., a corporation, and to its Attorneys, Messrs. Loeb and Loeb and Herman F. Selvin, Esq:

Notice is hereby given that John Luhring and Margaret Morris, as joint tenants, the plaintiffs

above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 22, 1940.

Dated: This 28 day of May, 1941.

ELLIS I. HIRSCHFELD
SAMUEL W. BLUM
By ELLIS I. HIRSCHFELD
Attorneys for Appellants John Luhring and Margaret Morris, as joint tenants, plaintiffs.
1215 Bankers Building
629 South Hill Street
Los Angeles, California.

Copy mailed to Attorneys for defendants May 31, 1941.

R. S. ZIMMERMAN,
Clerk,
E. L. S.

[Endorsed]: Filed May 29, 1941. [91]

[Title of District Court and Cause.]

ORDER FOR THE TRANSFER FOR ORIGINAL EXHIBITS

Upon reading and filing the aforementioned stipulation and good cause appearing therefor, it is hereby ordered that all original exhibits in the above

entitled matter shall be transmitted by the Clerk of the above entitled Court to the United States Circuit Court of Appeals for the Ninth Circuit, and shall be considered as part of the record upon the appeal herein.

Dated this 3rd day of July, 1941.

LEON R. YANKWICH
District Judge

[Endorsed]: Filed Jul. 3, 1941. [96]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD AND TO DOCKET APPEAL

Upon reading and filing the aforementioned stipulation, and good cause appearing, it is hereby ordered that the time within which to file the transcript of record on appeal in this action and to docket the cause on appeal be and it is hereby extended to and including the 15th day of August, 1941.

Dated: this 3rd day of July, 1941.

LEON R. YANKWICH
District Judge

[Endorsed]: Filed Jul. 3, 1941. [98]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO FILE TRANSCRIPT OF RECORD AND TO DOCKET APPEAL HEREIN, AND ORDER THEREON

It is hereby stipulated and agreed by and between the appellants and appellees, by and through their respective counsel that the time to file the transcript of record and to docket the cause upon appeal herein shall be and hereby is extended to and including the 27th day of August, 1941, and that the above entitled Court is hereby authorized to make and enter its order in accordance herewith without further notice or motion.

Dated: This 29th day of July, 1941.

ELLIS I. HIRSCHFELD
SAMUEL W. BLUM
By SAMUEL W. BLUM
Attorneys for plaintiffs-appellants, John Luhring and Margaret Morris.

LOEB & LOEB
By HERMAN F. SELVIN
Attorneys for defendant-appellee, Universal Pictures Company, Inc. [99]

ORDER

Upon reading and filing the aforementioned stipulation, and good cause appearing, it is hereby ordered that the time within which to file the transcript of record on appeal in this action and to docket the cause on appeal be and it is hereby extended to and including the 27th day of August, 1941.

Dated this 4th day of August, 1941.

LEON R. YANKWICH
District Judge

[Endorsed]: Filed Aug. 4, 1941. [100]

[Title of District Court and Cause.]

STIPULATION AS TO THE RECORD ON APPEAL [101]

It is further stipulated and agreed that the affidavits in support of and in opposition to plaintiffs' motion for new trial herein were duly served and filed by the respective parties within the time allowed by law, as extended by stipulation and by leave and order of the above entitled Court and that the same were duly used upon the said Motion for New Trial and were duly considered by the Court in respect thereto, and that the various stipulations and orders in respect to the filing of the said [102] affidavits may be omitted from the record on appeal herein.

Dated: This 29th day of July, 1941.

ELLIS I. HIRSCHFELD
SAMUEL W. BLUM
By SAMUEL W. BLUM
Attorneys for plaintiffs-appellants, John Luhring and Margaret Morris

LOEB AND LOEB
By HERMAN F. SELVIN
Attorneys for defendant-appellee, Universal Pictures Company, Inc.

[Endorsed]: Filed Aug. 13, 1941. [103]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 103 inclusive contain full, true and correct copies of Complaint; Amended Complaint; Petition for Removal; Bond on Removal; Order for Removal; Certificate of Clerk of State Court; Amended Answer of Defendant; Order Overruling and Sustaining Demurrer and Denying Motion to Strike From Answer; Memorandum Decision; Findings of Fact and Conclusions of Law;

Judgment; Notice of Motion for New Trial; Motion for New Trial; Affidavits of Ellis I. Hirschfeld, Leo Taub, Erich W. Lenk and Herman F. Selvin; Stipulations and Orders Postponing Hearing Motion for New Trial; Minutes of Hearing Motion for New Trial; Order Denying Motion for New Trial; Notice of Appeal; Stipulation Waiving Bond on Appeal and Order; Stipulation for Transmittal of Original Exhibits; Order for Transmittal of Original Exhibits; Stipulations and Orders Extending Time to File the Record and Docket Appeal, and Stipulation Designating Contents of Record on Appeal, which together with the Reporter's Transcript of Testimony and Proceedings and the Original Exhibits constitute the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for copying, comparing, correcting and certifying the foregoing record amount to $17.15, which amount has been paid to me by the Appellants.

Witness my hand and the seal of the said District Court this 31st day of December, A. D. 1941.

[Seal] R. S. ZIMMERMAN,
Clerk,
By EDMUND L. SMITH,
Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

Appearances:

ELLIS I. HIRSCHFELD, Esq.,
SAMUEL W. BLUM, Esq., and
H. A. GEBHARDT, Esq.
For Plaintiffs.

LOEB & LOEB,
By HERMAN F. SELVIN, Esq.
For Defendant. [1*]

H. A. GEBHARDT,

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

The Witness: H. A. Gebhardt.

Direct Examination

Q. By Mr. Blum: Mr. Gebhardt, what is your occupation?

A. I am an attorney at law; a lawyer.

Q. In the State of California? A. I am.

Q. And admitted to practice in this state?

A. I have been admitted to practice in all the courts of this state since 1915.

Q. Are you familiar with the German language?

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of H. A. Gebhardt.)

A. I am. I was born and raised in Germany, studied law in Germany, took the first bar examination and took the degree of Doctor of Laws. After the first bar examination I took the office of what we call Referendar, which is an assignment to the various judges of the courts in Germany; first, Municipal Court, then Superior Court, District Attorney and attorney, later the District Court of Appeals, and again to the Municipal Court. I stayed there three and a half years, then went to London, England, and studied English law. I came to this country in 1914 and studied American law; was admitted to the bar here in 1915. I have [4] been practicing law, with the exception of the first years during the war, since then. I have practiced law in and around Los Angeles since 1930, continuously.

Q. Are you familiar with the German language and its writings and its printings?

A. I am very familiar with it. I speak and write it thoroughly. I was in Germany last year for four months and have kept up the study of the German law.

Q. Are you able to translate documents, written or printed in German, into the English law?

A. Yes; absolutely.

Q. You have done that many times?

A. Many times, yes.

Q. Have you ever done that in any action or proceeding in the courts? A. Yes.

(Testimony of H. A. Gebhardt.)

Q. Have you ever been used as an interpreter?

A. Yes, I have, in courts.

Q. Have you ever been used as a translator——

A. Yes, I have.

Q. ——in regard to the German law?

A. Yes.

Q. Have you had any recent contact with the German law?

A. Oh, yes. I have continuous contact with the German law. I am attorney for the local German consulate and handle questions of German law continuously, and have for the last [5] ten years. When I was in Germany last year I also interested myself in law and looked up various things and brought over various books.

Q. In your contact with the German Consulate have you had occasion to familiarize yourself with the German law, the written German law?

A. I have right along. It is almost an every-day occurrence that I have some question of German law come up.

Q. And you have made a thorough study of that, have you?

A. I have. I have kept up with the study of the later German law, as well as the former German law.

Q. Are you familiar with the books which contain the German code? A. I am.

Q. And with the contents of those books?

A. I am.

(Testimony of H. A. Gebhardt.)

Q. Do you know where those books were printed?

A. They were printed in Germany mostly, naturally.

Q. Do you know what books are used in the German courts as the official books?

A. Any reputable publication on the text and the codes is used in German courts.

Q. Now, you have in your possession certain documents? A. I have.

Q. Will you state to the court generally what this document is? [6]

A. This document, your Honor, is a——

Mr. Selvin: I would like to see it.

Mr. Blum: This is just preliminary, so we can identify it.

The Court: All right.

A. This volume here contains photostatic copies of the pleadings and the three judgments rendered in this case; namely, the judgment of the Superior Court, the District Court of Appeals and the Supreme Court.

Q. By Mr. Blum: And those are the judgments which are involved in this action?

A. Yes. This is the chain of title concerning the judgment that May Film secured against——

Q. Who appears in that action as the plaintiff?

Mr. Selvin: Just a minute. I suppose we ought to let the record speak for itself after it has been properly identified.

(Testimony of H. A. Gebhardt.)

The Court: Do you want to see it?

Mr. Selvin: Yes, I would like to see it.

The Court: The document speaks for itself, because it starts out "Klage", which is "Complaint." It shows der Mayfilm Aktiengesellschaft, complainant, against somebody else.

Mr. Blum: The court speaks German, does it not?

The Court: I wouldn't anwer that yes or no. My knowledge is not so excellent as it might be. At least, [7] I don't claim any knowledge of legal German. That is a science in itself. Probably to ordinary German I would answer yes. I am satisfied, however, with Dr. Gebhardt's reputation for integrity; and his thorough knowledge of the German language should not be challenged by anybody. We won't have any difficulty and won't have to check on him.

The Witness: Thank you, your Honor. [8]

Q. By Mr. Blum: Dr. Gebhardt, you made a translation of that entire file, did you not?

A. I will answer that yes, to this extent: That I translated approximately nine-tenths of it personally. As you will see, this is a very voluminous file, and I had some assistants, whose translations I checked page for page and corrected as much as I could.

Q. It was done under your direction and supervision?

(Testimony of H. A. Gebhardt.)

A. It was done under my direction and supervision, yes.

Q. And after it was completed you checked all the translation? A. That is correct.

Q. And you have that translation?

A. I have. [10]

Q. Doctor, do you know what the Landgericht is? What court is the Landgericht?

A. The Landgericht or Superior Court is a court of record, having jurisdiction in civil matters, either which exceeds the jurisdiction of the Municipal Court in value or involves real estate or other important—pardon me, not real estate—involves other important litigation. I can give you the definition of the exact jurisdiction of a superior court, which is similar to the jurisdiction of the Superior Court here, by referring to the Code of Civil Procedure, which the gentleman on the other side has with him.

Q. Is it a court of general jurisdiction?

A. It is.

Q. And its judgments there are recognized, of course, in Germany as judgments?

A. They are.

The Court: Are its judgments enrolled or recorded in the sense in which we use those phrases in English law?

A. The original judgments remain in the files of the court. The parties are given certified copies of the originals, which remain in the file of the

(Testimony of H. A. Gebhardt.)

court. You cannot get the original from the court.

The Court: And they remain there as part of the court's records? A. That is correct. [12]

The Court: And they are enrolled or entered upon the minutes of the court, also?

A. That is correct.

Q. By Mr. Blum: Is the Landgericht a court of record? A. It is.

Mr. Selvin: We don't dispute the existence and creation and jurisdiction of that court.

The Court: All right. That will save time.

Mr. Selvin: Either the Landgericht, the Kammergericht or the Reichsgericht. [13]

Mr. Blum: Would you stipulate there was a Universal Pictures Corporation of New York at the time this action was commenced?

Mr. Selvin: I will stipulate there was a New York corporation called Universal Pictures Corporation, in 1926.

Mr. Blum: At this time we offer into evidence the complaint in the action, having the English title of May [15] Film Corporation vs. Universal Pictures Corporation, New York, 730 Fifth Avenue, defendant, which are pages 1 and 2.

Q. And the exhibit is what?

A. 3 to 6, inclusive.

Q. The complaint, with the exhibit, are pages 1 to 6, inclusive? A. That is right.

Q. And the translation of the same is 1 to 6, inclusive? A. Correct.

(Testimony of H. A. Gebhardt.)

Mr. Selvin: I think it is immaterial, but I have no objection to it. I don't know why we have to go behind the judgment. It is at least prima facie.

Mr. Selvin: It may save considerable time, your Honor, if I say at this time that we will not offer any proof in support of the allegations of our first affirmative defense.

The Court: All right. At any rate, the translation, appearing on the pages indicated by counsel, being the six pages of Exhibit 2, will be marked Plaintiffs' Exhibit 3. [16]

Mr. Blum: And we offer the original photostatic copies, also.

Mr. Blum: At this time, your Honor, pursuant to a statement of Mr. Selvin that no objection would be made, we offer the entire transcript, which is Plaintiff's Exhibit 1 for identification, into evidence, together with the translation thereof, which is Plaintiffs' Exhibit 2 for identification, with this understanding: That as to the judgments in there, to-wit, the three judgments, the recitals therein shall be given the effect of recitals in judgments, as a matter of law. That as to the other portions of the record, to-wit, those matters are not necessarily offered for the truth of what is stated therein, but is primarily offered to show that certain proceedings [17] were before the court.

Mr. Selvin: In other words, the judgments shall have whatever effect, by the law to be applied, shall

(Testimony of H. A. Gebhardt.)

be given them; and the other matters in the file are to show what was in the German court.

Mr. Hirschfeld: Well, we offer it for whatever purpose may be competent, and counsel is restricting his objection to the matters as he stated them.

Mr. Selvin: I do object to the file going in if, for instance, the testimony of the witness shown in that trial is offered not to show that the witness so testified in Germany, but to prove the substantive facts to which he testified. That is hearsay, so far as we are concerned. But if it is offered merely to show what was before the German court, we have no objection to it. [18]

The Court: It seems to me, gentlemen, that the best thing to do is to receive the original photostatic copy as Plaintiffs' Exhibit 1. It is now Exhibit 1 for identification, isn't it?

The Clerk: Yes.

The Court: Receive the translation as Exhibit 2. And unless you want the other exhibits to remain separately they can be withdrawn. And I instruct the clerk to delete the markings of 3 and 4, because they are already included in the exhibit.

Mr. Blum: Yes, they may be deleted, because they are now included.

The Court: Exhibits 3 and 4 will be withdrawn because they have been included in Exhibits 1 and 2, which are now [19] admitted. All right, proceed.

(Testimony of H. A. Gebhardt.)

PLAINTIFF'S EXHIBIT No. 2

Certified Copy.

74. O. 590. 26/70.

In the name of the people!

Rendered
March 4, 1930.
(signed) Hulbe Court Clerk
as recorder of the Court.

In re

May Film Corporation in Berlin W. Tauentzienst. 14, represented by its Directors Joe May and Manfred Liebenau,

Plaintiff and Crossdefendant

Represented by: Attorney Dr. Curt Ebstein, Berlin W. 8, Behrenst. 27,

versus

Universal Pictures Corporation, New York, 730 Fifth Avenue,

Defendant and Crosscomplainant

Represented by Attorneys Counsellor of Justice Dr. Rosenberger, Dr. Richard Frankfurter and Dr. Gerhard Frankfurter in Berlin-Wilmersdorf, Nikolsburger Place 2,

Department No. 17 for Commercial matters of the Superior Court No. I in Berlin after trial on March 4, 1930 by Presiding Judge Loeschhorn, and

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

commercial judges Levy and Friedlaender has adjudged:

Plaintiff's complaint and defendant's crosscomplaint are denied.

Plaintiff is to pay 5/6, defendant 1/6 of the costs of the suit.

Upon furnishing of security of 500 RM execution may be issued under this judgment.

STATEMENT OF FACTS.

Plaintiff has alleged that on May 10, 1926 in Paris it entered into the agreement with defendant copy of which is contained on pages 3 to 6 of the exhibits. That under the agreement plaintiff was to produce for the defendant the film: "The Emperor's Lustre" which the defendant acquired under certain conditions for Germany, France, Belgium and Switzerland. That in Section 12 of this agreement it was stipulated that in case of violations of this agreement the guilty party would pay to the party complying with the contract a contractual penalty not subject to judicial discretion in the amount of 50,000 Marks without prejudice to further claims for damages. That is was further agreed that non-compliance with the terms of payment entitled the plaintiff to cancel the contract with forfeiture of the payments made until then. That the claim for the contractual penalty as dam-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ages was not affected thereby. That there were no oral *a*nderstandings besides this agreement. That changes require written form.

That the defendant did not make the payments to the plaintiff provided for in the agreement. That plaintiff cancelled the agreement on June 7, 1926 and demands in this suit payment of the contractual penalty with reservation of its rights for further damages.

That the agreement was signed for defendant by its general representative L. Burstein. That he was authorized to represent the defendant.

Plaintiff prays:

that defendant be ordered to pay to plaintiff the sum of 50,000 Reichsmarks with interest of ¾% per month from July 1, 1926 and that execution may issue upon furnishing of security.

Defendant has prayed

that the complaint be denied with costs to defendant, alternatively that it be allowed a stay of execution in case of adverse judgment. Defendant has filed a cross complaint with the prayer that it be adjudged that plaintiff has no further claim for damages besides the claim sued upon.

Deft denies entering into a binding agreement, alleging that Burstein had no authority to enter into it, inasmuch as his power of attorney did not extend to film production. That it was known to

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

the directors of plaintiff May, furthermore that Burstein particularly called it to their attention.

That Burstein did not intend to enter into a final agreement in the name of the defendant. That May asked him on May 9, 1926 at a meeting in Paris to make a contract with him in behalf of defendant in case the association contemplated for the exploitation of the film should not materialize. That Burstein at first declined, calling attention to his lack of power of attorney and that only upon the fervent request of May he agreed, subject to the approval of the Director General of defendant, Laemmle, to enter into the agreement, in case the association should not materialize. That thereupon May drew up the agreement and submitted the draft to Burstein. That he (Burstein) objected to some details, especially the stipulation as to the contractual penalty and stated, that he could not submit such stipulations to Laemmle. That May agreed to every change and that in his presence Burstein crossed out the provision regarding the contractual penalty.

That the agreement was not approved by Laemmle. That the association did not materialize because May prevented it purposely. That plaintiff cannot claim any rights from this condition maliciously induced by it.

That it appears from the fact that May thereafter made a contract with Phoebus-Film, Ltd. emphasiz-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ing, he was not bound otherwise, that plaintiff did not consider itself bound by the agreement of May 10, 1926.

Plaintiff has denied these allegations of the defendant and has prayed to deny the cross complaint.

Regarding further allegations of the parties reference is made to their pleadings read in court.

Evidence was taken according to the orders of April 27, 1927, April 17, October 2, December 14, 1928. Reference is made to the orders to take testimony and the testimony of the witnesses Burstein, Fellner, Gallizenstein, Weinert and Muehsam contained in the minutes of February 7, June 14, 1928, February 7, March 7, May 2, 1929 and January 28, 1930.

Conclusions.

(Grounds for decision)

The complaint based on the agreement of May 10, 1926 is logical, but not justified. It is true that plaintiff has proved, as was incumbent upon it, that the agreement of May 10, 1926 was entered into between the parties and that Burstein was authorized by defendant to enter into it.

Witness Burstein testified at his examinations of February 7, 1928, January 28, 1930 that at that time he was agent of the defendant in fact practically General Manager. That the character of the defendant was restricted to the sale of films, that he

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

had general power of attorney for same. That in it a transaction like the one he entered into with the plaintiff was not contemplated, that therefore defendant could "practically" have stated to him that he had to consult them regarding such a transaction. That he stated to May that he could not really do that, but that the President Laemmle in America would undoubtedly approve the matter. That he had a moral right to enter into such transactions, that he signed the agreement of May 10, 1926 in Paris. That May stated to him before he signed the contract that he could make any reasonable change desired, that he signed the agreement relying upon this promise, when "it" was the opinion that one agreed on the contents of the agreement on general lines. That he signed the contract as an entity "in grosso modo". That he was certain that he would get it through with Laemmle, but that he expressly refused to sign every single page of the agreement with his initials and that before signing he stated to May in effect that he could in fact get anything through with Laemmle, but that he had to have a conference with him first.

From this testimony it appears with certainty that Burstein intended to enter into the agreement in behalf of the defendant without reservation. His refusal to sign every page of the document with his initials is considered immaterial by the Court. Even

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

if it were customary among American businessmen to consider an agreement binding only if initialed in this manner, the omission of the signing of the single pages could not be considered in interpreting sec. 346 Commercial Code. The partner in the agreement of defendant May is not an American businessman, the agreement was entered into in Paris, lastly Burstein testified that he agreed with May regarding the consummation of the contract along general lines and that he signed it. In view of this testimony it would be against good faith and equity if the defendant would consider a contract, the contents of which were agreed upon by its representative and the plaintiff along general lines and signed by him, as not consummated because the single pages were not initialed.

From his testimony the court finds that Burstein was certainly authorized to the consummation. Even if general power of attorney issued to him did not contemplate such transactions as the one he entered into with the plaintiff, he testifies, that he was "morally" authorized to enter into the contract, and that he was certain, that the agreement would not be objected to. He further testifies that the idea that plaintiff produce films in conjunction with the defendant was unquestionably approved by Laemmle.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The further defense of the defendant that the agreement was entered into only under the condition that the association planned originally would not materialize has not been proven by the evidence. The agreement entered into later by the palintiff with Phoebus Film, is not adverse to the fact that a binding agreement was entered into by the parties on May 10, 1926, because the plaintiff cancelled the agreement on June 7, 1926 because of the refusal of defendant to fulfill.

In view of these findings the prayer of the cross-complaint, which is otherwise admissible, cannot be granted. The cross-complaint was therefore denied.

However the claim to payment of the contractual penalty is without right. As Burstein testified at his second examination May had granted him the right to make any reasonable change of the agreement, that the parties only agreed upon the contract as an entity along general lines. From these understandings the defendant had the right, to cross out any objectionable clauses of the agreement. It is immaterial whether this was done in presence of May in Paris, or later on. In view of the reservations by Burstein there was no meeting of the mind as to such details, which were not the fundamentals of the agreement. Plaintiff can therefore not rely on paragraph 12, as according to Civil Code sec 154,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

155 it is to be assumed that the parties would have entered into the agreement also without the stipulation regarding the contractual penalty. Decision had therefore to be rendered as stated above. Decision regarding costs is based on sec 92 Code of Civil Procedure; regarding execution sec 710 id.

signed Loeschhorn

also for Commercial judge Levy (on vacation) and commercial judge Friedlaender who is absent.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Dr. Paul Dienstag
Attorney at the District
Court of Appeal & Notary
Berlin W. 57, Buelow St. 22
At Elevated Station Buelow St.
Telephone Luetzow 8242 & 8243

Berlin April 16th, 1930.

District Court of Appeal &
District attorney D. C. o. A.
April 17th, 1930

Appeal

In re

May-Film Corporation at Berlin W,
Tauenzienst. 14, now: Koch St. 6/7, represented by its members of the Board of Directors Joe May and Manfred Liebenau, same address.

Plaintiff, Cross-Defendant and Appellant,

Represented by Attorney Dr. Paul Dienstag at Berlin W. 57, Buelowst. 22

versus

Universal Pictures Corporation, New York, 730 Fifth Avenue,
Defendant, Cross-Complainant and Respondent,

Attorneys in the Court of first instance: Attorneys Counselor of Justice Dr. Rosenberger, Dr. Richard Frankfurter and Dr. Gerhard Frankfurter at Berlin-Wilmersdorf, Nikolsburger Place 2,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Court of first Instance: Superior Court I Berlin,
File number first instance: 74.0.590/26.

To the District Court, Berlin:

I hereby file this Appeal in behalf of the Plaintiff, Cross-defendant and Appellant against the judgment of the Superior Court I Berlin, rendered on March 4th, 1930, not served as yet, with the motion: to decide according to the prayer in the first instance, under reversal of the judgment appealed from.

GROUNDS.

First all the statements and arguments of the first instance are maintained and herewith repeated. The testimony of the witness Bruchstein (means: Burstein) is not suitable to justify the point of view, upon which the Superior Court bases its decision.

Further arguments are reserved for a detail brief.

(signed) DIENSTAG
Attorney.

(Testimony of H. A. Gebhardt.)
Plaintiff's Exhibit No. 2—(Continued)

District Court of Appeal Berlin, June 3, 1932.
25.U.5849/30

Present:
Counsellor of District Court Voss,
As requested Judge,
Court Employee Deichsel as Clerk of the Court

In the Matter of
May-Film versus Universal Pictures Corp.

appeared at the call:
For the Appellant
Attorney Dr. Dienstag

For the Respondent
Attorney Dr. Frankfurter.

As Witness:
Joe May.

After being advised regarding an oath, he was examined as follows:

My name is Joe May, I am 51 years old, Film Director, am not related or related by marriage to the parties, I have a financial interest in the outcome of the lawsuit. I have given a guarantee to the Bank for Foreign Commerce for credits which it has extended to the plaintiff, and for that reason have assigned the claims from this lawsuit to the Bank as security.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

This assignment was made a few days ago, orally to Dr. Lenk, there is also a document in writing in the files of attorney Dr. Dienstag, an assignment signed by myself, which has not been delivered as yet.

There was a discussion between myself and Aussenberg regarding the May-Film Corporation, and it was agreed between us, that besides other assets the claim in this lawsuit should belong to me. I paid 45,000.00 Marks for these assets. The lawsuit was to be continued by the Corporation. After the plaintiff went into liquidation the liquidator demanded confirmation from Aussenberg that the claim sued upon belonged to me and therefore, should not be part of the liquidation assets. I undertook a deficiency guarantee to all the liquidation creditors in the amount of 40,000.00 Marks. Aussenberg gave the same guarantee. I am convinced that there is not any possibility that I be relieved of this guarantee of 40,000.00 Marks, not even if the result of this lawsuit would and could be taken into the liquidation assets.

To the facts:

When the agreement was signed and when I took Burstein to the depot he told me that he signed the agreement * * *

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Certified Copy

25.U.5849/30

74.0.590.26.

In the Name of the People!

(Written by Hand:) "Certified Copy Judgment given to Plaintiff, Berlin, 8/24/32"

Rendered July 27, 1932.

(signed) Gehrke, Court Clerk, as Official to verify documents for the Business Office.

(Signature)

As Official to Verify Documents

In the Matter of

Mayfilm Corporation, 6-7 Kochstr., Berlin, now in liquidation, represented by the receiver, Attorney Dr. Alexander Maier, 225 Friedrichstr., Berlin.

Plaintiff, Appellant, and Respondent: Attorney Dr. Paul Dienstag, 5 Clausewitzstrasse, Berlin-Charlottenburg,

versus

Universal Pictures Corporation, 730 Fifth Avenue, New York, represented by their Board of Directors, President Carl Laemmle, Vice-President Robert H. Cochran, Secretary Helen E. Hughes, Treasurer E. H. Goldstein,

Defendant, Respondent, and Appellant,—Counsel:

Attorney Dr. Sarre, 2 Nikolsburger Platz, Wilmersdorf—Berlin,—

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The 25th Civil Senate of the District Court of Appeal in Berlin, has, upon oral Hearing of July 8, 1932, in the presence of the President of the Senate, Huecking, and

the Counsellors of the District of Appeal, Kliene and Voss, have ordered adjudged and decreed: Upon appeals of both parties the judgment rendered on March 4, 1930, in the 17th Chamber for Commercial matters of the Superior Court I, Berlin, is changed as follows:

(1) The Defendant is ordered upon the complaint to pay 50,000.—R.M., plus 2% interest over and above Reichsbank discount rate from July 1, 1926.

Prayer of the Complaint for additional interest is denied.

(2) Upon the Cross-Complaint it is adjudged that the Plaintiff is not entitled to damages in excess of the 50,000 R.M., with interest awarded under 1) under the agreement of May 10, 1926.

(3) The costs of the lawsuit are canceled against each other.

(4) Temporary execution may issue under this judgment, the Defendant being permitted to prevent execution of judgment by putting up a bond in the amount of 55,000.00 R.M.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Facts

The Plaintiff alleges that represented by its then Board Member, Joe May, on May 10, 1926, in Paris, it concluded with the Defendant, represented by their Manager of their Berlin office, Burstein, the original contract submitted, with its side agreements concerning the production of the motion picture to be made from the script, "Candlesticks of the Emperor" purchased by the Defendant, to be directed by Joe May. That in paragraph 12 of the contract a contractual penalty of 50,000 R.M. is provided in the event that one party violates its contractual obligations, and that it has further been stipulated that for non-fulfillment of the terms of payment the Plaintiff be entitled to withdraw from this contract with forfeiture of all payments made to that date and reservation of right to the contractual penalty. That the conditions under which the contract was to become effective have taken place, the finance consortium originally planned which was to take over the *the* financing in cooperation with the Defendant or with Burstein personally in collaboration with a Mr. Braatz had not been formed by May 20, 1926, the time agreed upon; therefore no contracts concerning the production of the motion picture were entered into with the consortium; that the businessman Fellner had signed the guarantee provided in the contract for

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

not exceeding a maximum amount of 330,000 R.M. that this declaration had been deposited in the Berlin Office of the Defendant as agreed upon. That the Defendant in spite of this, failed to comply with its obligations to pay up to May 20, 1926, but withdrew from the contract because their representative, Burstein, had made the compliance with the contract dependent upon further conditions, other than those of the original agreement. That, therefore, the Plaintiff had justifiably withdrawn by letter of June 7, 1926, that the contractual penalty had become due, also that plaintiff could claim further damages; that damages in an amount of approximately 142,000 R.M. were suffered by reason of the non-fulfillment of the agreement.

The Plaintiff demands, in the present complaint, that the Defendant be ordered to pay 50,000.R.M., contractual penalty, plus ¾% monthly interest from January 7, 1926, and reserves further claims for damages.

The Defendant demands dismissal of complaint and further has filed a cross-complaint for declaratory relief, that the Plaintiff is not entitled to the further claims for damages asserted by him. (Plaintiff moves for dismissal of cross-complaint.)

Defendant denies that a binding contract had come into effect.

That according to the specific Power of Attorney, Burstein was not entitled to conclude a motion pic-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ture production contract and had stated the same to Joe May. That for this reason the effectiveness of the contract was then made conditional upon approval by the Defendant's president, Laemmle. That, moreover, the contract drawn up on the night of May 9th to 10th by May was not in accordance with the previously agreed conditions, especially with regard to the contractual penalty: that Burstein objected to this in the morning of May 10, 1926, when he hurriedly signed the contract shortly before his departure for America and May conceded to him that the Defendant should have the right to make any reasonable change in the contract; that Burstein had crossed out the stipulation concerning the contractual penalty when signing the contract in the copy which he took to America. That an indication pointing to incompleteness in the contract is that May, but not Burstein, signed the separate pages of the agreement (initialed in the margin). That as is known in motion picture circles, this means, according to American custom, that a mutually binding agreement had not yet come into effect. That an approval on the part of Laemmle had not been forthcoming.

Furthermore, that the condition of the contract regarding non-formation of the consortium was, in violation of good faith and morals prevented by the Plaintiff, since May did not further concern himself

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

with its formation. That May did not consider himself bound since he had allegedly concluded a motion picture contract with the Phobus Company before his withdrawal and declared to the gentlemen in question that he was not bound.

That because of this agreement with the Phobus Company, no damages were suffered by the Plaintiff.

That the condition that Fellner guarantee, that a maximum amount of 330,000.M., production costs be not exceeded, did not occur. That, when Fellner signed the declaration, drafted as agreed upon at the signing of the contract, it was changed by May to an amount of 350,000.M; that the document, which was later changed back again to 330,000.M, is not clear nor certain, because of the double change, and, in particular, the guarantee for not exceeding the production costs of the picture was a condition for the Defendant according to the intent of the agreement.

That for these reasons, and since the Defendant, or Burstein, in the letter of May 20, 1926, from America addressed to the Plaintiff had only made demands in accordance with the contract, a withdrawal from the contract and a delay of payment had not occurred on their part; that on the contrary, May, without legal grounds, withdrew from the contract, if a conclusive contract existed at all. That

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

he did this because he had found better conditions with the Phobus-Film Company.

The Plaintiff denies the allegations of the Defendant. That the Plaintiff, or May, in fact, had allegedly concluded the contract with Phobus-Film Company after the Defendant had expressed, through Burstein, their intention not to comply with the contract. Damages were suffered since the conditions with the Phobus-Company were worse and the contract could have been effected with the Phobus Company at the end of the three months which had been allowed for production in the contract with the Defendant. That Burstein had not shown his Power of Attorney when signing the contract but emphasized orally that he was the General Manager with Full Authority. That he had expressed himself to the same effect on various other occasions in Europe, and therefore, with the knowledge of the Defendant, presented himself as their General Manager with Full Authority, as, for examples, in a contract with Galitzenstein in June, 1926, but even previous to this and on other occasions. That this constituted implied power of attorney.—That the condition concerning the consortium failed because the interested party, Braatz, did not busy himself with the matter, as well as for the reason that the Defendant, himself, sent no news from America concerning their participation. That the further condition regarding the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

guarantee of Fellner had taken place since the change was immaterial and had been changed back with the knowledge of Fellner; that Fellner had actually undertaken the requested guarantee. That the document had been deposited on time, in this case, May 19th, at the latest. That a breach of contract on the part of the Plaintiff did not occur since, after receipt of Burstein's letter of May 20, 1926, it had to figure on non-fulfillment on the part of the Defendant, and was forced to enter, at least, into a contract with the Phobus Company in order not to remain entirely without production.

After taking evidence, the Superior Court dismissed the complaint and the cross-complaint by the judgment of March 4, 1930, herein referred to. Against same, both parties have filed appeals, and prayed:

The Plaintiff: to render judgment according to the complaint under reversal of the former judgment and dismissal of opponent's appeal;

The Defendant: to render judgment on the cross-complaint by reversal of judgment, and dismissal of opponent's appeal and possibly the permission be granted to them to prevent execution by posting bond.

The parties have, to begin with, essentially repeated their arguments of the first trial, the Plaintiff's briefs of June 27, 1930, January 24, 1931, the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Defendant's briefs of Aug. 5, 1928, Nov. 28, Dec. 3, 1930, and Feb. 5, 1931, being herewith referred to. Then, by an order of Dec. 5, 1930, a hearing to take testimony was set, the taking of which was considerably delayed by the absence of some of the witnesses, both parties having again exchanged briefs, the contents of which were submitted at the last hearing, the Plaintiff's briefs of June 8, 1931, May 23, 1932, June 27, and July 7, 1932 and the Defendant's briefs of August 11, 1931, July 4 and 5, 1932, and the supplementary documents presented at the hearing, being herewith referred to. Regarding the outcome of the hearing to take testimony, the minutes of March 21, and July 7, 1931, and June 3, 1932, are herewith further referred to.

The Plaintiff objects to the use of the affidavit of Fellner and the notations in the files of Dr. Frankfurter as evidence.

The Defendant lastly objects to the Plaintiff being the proper party (since the claim, in reality, appertained to Joe May personally, as becomes evident from the first part of his testimony), as well as to its being the proper party defendant since the contract had been concluded with the independent branch office in Berlin.

The Plaintiff requests that these objections be overruled as belated, especially the latter.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Grounds for Decision

I) The contract upon which the complaint is based, was concluded in Paris between a German Motion Picture Company (Plaintiff) and an American Corporation. The question arises as to which country's laws are to be applied. It is generally accepted that in such cases, where the parties have agreed upon a certain place of jurisdiction for the decision of controversies arising from a contract, the law of the place of jurisdiction is considered as the law which they intended to apply. In the contract the condition is stipulated under paragraph 14 that the place of jurisdiction shall be Berlin-Center. Therefore, German Law is to apply to the relations existing between them. Berlin has also been agreed upon as the place of performance in question, (the production of the motion picture, "Candlesticks of the Emperor",) and the obligations of payment of the Defendant, (which were to be made by their Berlin Office as place of payment) the center of their obligations is, therefore, also in Berlin, and in Germany. Consequently, German law is to be applied.

II) The Plaintiff is entitled to sue upon the claim. For its contention that this is not the case, defendant relies upon the testimony of the witness, Joe May, according to which he is alleged to have discussed and agreed, as stockholder, with the other

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

stockholder, Aussenberg, that besides other assets the claim here sued for belonged to him, while the suit was to be continued by the Corporation; May has, as he has stated, taken upon himself a deficit liability towards the liquidation creditors of an amount of 40,000. Rm.; he also claims to have paid 45,000 Rm. but states, on the other hand, that he would not be released from his liability even if the result of the present law suit should go into the liquidation assets.—According to this testimony, it must be assumed that the claim was not really "assigned", so that it was transferred from the corporation to one of the associates, May, but that the agreement between the associates was that after completion of the liquidation, the asset in question should be transferred to the associate, May, out of the remaining assets. It is supposed to have been especially agreed that the corporation should be authorized to continue the litigation, and therefore be entitled to the proceeds of the law suit. The Plaintiff is the corporation, represented by the liquidator. Distribution of the assets of the corporation among the associates would be invalid as to him, before the corporation debts were paid, because the associates are not authorized to divide among themselves the assets of the corporation, without taking care of the debts.

III) The Defendant denies to be the proper debtor. That the agreement was not made with it,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

but with the Berlin Branch, an independent legal entity, to wit, a limited corporation. This objection first was made in the last Oral Hearing in the Appelate Court, but it could have been raised by the Defendant in the first instance. The Court has come to the conclusion that it has been raised only for the purpose of delay, that the failure to raise it sooner is gross negligence. This objection, therefore, was rejected according to Section 529, Code of C.C.P.—furthermore, it is not justified. As parties to the contract in the main agreement of May 10, 1926, are named, the Plaintiff on one side, the Universal Film Corporation, New York, Branch Office, Berlin on the other side. The correct name of the Defendant is, "Universal Pictures Corporation, New York."

The agreement and the side agreements are to be considered as one agreement. In the side agreements there always appear the heading: "To the Universal Pictures Corporation, New York Berlin." From this it can be seen that the American Corporation was meant as party to the agreement, and it must be assumed that it had also a branch office in Berlin, which through its representative, Burstein, has the position of a representative and of that party, to which the detailed completion of the agreement was left by the regular party to the agreement. Since so much stress has been laid upon the fact that the agreement was signed before the departure

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

of Burstein for America, and that one copy was taken along by Burstein to America, it was clear between the parties that the American firm was the party to the agreement with the Plaintiff, and the binding of this firm apparently was essential to May. This Burstein not only could see, but he realized it. For these reasons, the incorrect wording in the heading of the main agreement cannot speak against the fact that the Defendant is the proper party Defendant.

IV) The Complaint is based upon the provision in Nos. 12-13 in the agreement of May 10, 1926:

> 12) "In case of violations of this agreement, the party violating the agreement shall pay to the party complying with the contract a contra*cual* penalty, not subject to judicial reduction in the amount of Fifty Thousand Marks, without prejudice to the further claims for damages.
>
> 13.) Non-compliance with the terms of payment entitles the Mayfilm to cancel the contract, with forfeiture of the payments made until then. The right to the contractual penalty and further claims for damages is not affected thereby."

No. 12 has been crossed out in the copy of the agreement of Defendant in indelible pencil. No. 13 has not been crossed out. In the copy which Joe

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

have agreed that this agreement (signed by Burstein) of May 20, 1926 shall go into effect if,

1.) The finance consortium planned between you (Burstein) and Mr. Braaatz for the financing of the film 'Candlesticks of the Emperor' has not been formed until May 20, 1926.

2.) The agreements contained in the Exhibit of Mr. Fellner and myself have not been signed by the consortium under the guarantee of Universal until May 20, 1926.

3.) Mr. Hermann Fellner has not confirmed by his signature the guarantee for the Mayfilm agreement given by me today under his power of attorney.'' Regarding Paragraph No. 3, the parties agree that the word ''not'' should be left out as the signature was the condition for the going into effect.

This, then, was a compilation of the conditions under which the agreement, the wording of which was put down in the main document, was to become effective. If Laemmle's approval had been a condition, it certainly would have been inserted at this place. The entire wording of the agreement, as it has been submitted, shows that it was discussed in great detail and that the author took great pains to include everything which had been agreed upon. As surplusage, the main agreement contains the clause in paragraph 15 that oral agreements have not been made beside this agreement. The contract involved

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

a large object, much depended upon it for the Plaintiff, as Burstein knew. If as a business man, he signed the agreement, as it was submitted to him in the morning of May 10, 1926, he must apply it against himself and cannot justly object that the agreement was not entirely in consonance with the conferences. If he did not want it, Burstein could have easily crossed out the clause regarding oral side agreements. The other side had to assume under the circumstances that Burstein intended the contract in the present form. If he really stated that, "he could not really do it, but that the Director General, Laemmle would approve it without question" this was not a mutual contractual statement of intent in view of the signed contents of the agreement, but an irrelevant unilateral remark, which was made by way of conversation, and which the other side could mainly consider as applying to the inner relations between Burstein and his American principal.

This construction is given weight by the fact that Burstein later, at a time when according to the statements of Defendant, Laemmle had not given the approval in question, took the position that not he or the Defendant, but May, or the Plaintiff violated the agreement that then (in the letter of June 10, 1926) he did not point out the lacking approval of Laemmle. Also, that he did not notify the Plaintiff promptly as to the approval or non-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

approval. It is true the time therefor was short. It had to be decided until May 20th, whether the agreement should be effective or not. This short space of time speaks against the fact that Laemmle's approval was to be secured first. It must be assumed that if this really was agreed upon, Burstein would have gotten in touch with Laemmle by cable and would have secured his statement promptly.—In any event, the burden of proof is upon the Defendant (in view of the written agreement). That the approval was a condition of the contract and this burden of proof has not been met and would not be made, even if May later told other people that he did not consider himself bound when he made an agreement with Phoebus Corporation; he couldn't say anything else, as otherwise its representative would not have made an agreement with him. If the witness, Liebenau (whose affidavit Defendant submitted, to which Plaintiff objected as evidence, and which cannot be used as such; the witness himself could not be reached) would testify as stated in his affidavit, this would not be decisive. He only says as he was advised that the agreement with May was concluded with the proviso that it had to be approved by Laemmle (it cannot be ascertained by whom he was advised); inasmuch as Liebenau was not present when the agreement was concluded, this statement cannot be of decisive value.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The assumption that it was an offer of the Plaintiff with unilateral binding, must be rejected for the reasons stated. The fact that Burstein (in contrast to May) did not initial the various pages, cannot prove what Defendant has to prove. It is a point which can be used for interpretation in favor of Defendant, and must be considered, but it is not sufficient. First, the omission of the initials can easily be explained by the hurry in which Burstein finally signed (while May had more time during the night when working). It is very doubtful whether Burstein as a Swiss citizen, who had his residence usually in Switzerland when making an agreement with a German firm, laid such stress on a possibly existing American custom, according to which it was usual and necessary for mutual obligations to initial the various pages. As a matter of form, this point cannot be considered, because as has been explained under I, the relation between the parties must be judged according to German law. Therefore, the form of a transaction is governed by German law, according to Art. 1, E.G.B.G.B. (Introductory Law to the Civil Code).

2) The Defendant has submitted an American Power of Attorney for Burstein (Translation Vol. I, P. 157 exhibits), which says that Burstein is hereby authorized to represent it in the territory named with the following rights and under the fol-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

lowing restrictions: now follow under twenty-six numbers special kinds of transactions, which the representative is authorized to do. Under these transactions the concluding of agreements for the productions of films is not included in No. 24, which says in so far as the Power of Attorney authorized Burstein to make agreements regarding matters other than the specific delivery of films of the Corporation to others (i.e. leasing of films) that the Power of Attorney is restricted to transactions which do not involve an amount in excess of 5,000 Dollars.

According to the wording of this Power of Attorney, Burstein certainly was not authorized to represent the Defendant in the agreement made on May 10, 1926, since this agreement assigns to the Plaintiff the production of a film, "Candlesticks of the Emperor", for a price of 300,000 R.M. (also a guaranteed minimum income of 60,000 R.M. from the interest in the countries outside of Germany, France, Belgium, Switzerland, U.S.A.) According to generally accepted law principles, anybody who deals with the representative must examine the Power of Attorney and runs the risk that the alleged Power of Attorney does not exist. Therefore, the agreement is not binding for the principal. Besides these generally-accepted law principles, the jurisdiction has recognized an implied Power of Attorney in the interest of legal safety

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

in commerce and business in such cases, in which the representative with the consent of the principal, acts to the outside as a representative. The giving of a Power of Attorney can, in principle, be made without any particular form. It would be against good faith and morals if the principal who consents to the appearance of a representative in his name could reply upon the contents of a Power of Attorney which is unknown as to its details, containing many clauses and is restricted. That is the situation here. Burstein used the designation on his letterheads, which could only be considered by the German parties to the agreement that he had General Power of Attorney. The letterhead reads as follows (in big print):

"Universal Pictures Corporation"
of New York
Carl Laemmle, President"

on the left side it says: "L. Burstein

Office of the
General Manager"

and on the right side, the business address in Berlin is given.

From this, it can only be deduced, without detailed knowledge of the conditions, that L. Burstein was the person who was generally authorized to conclude business transactions for the American

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Corporation in Germany. The term "General Manager" is not generally known here in its meaning. An authentic interpretation was given by Burstein when he called himself, in the agreements, "General Representative". This happened, for instance, in the agreement with Galitzenstein, which was notarized on June 14, 1926, also regarding the production of a film. In the side agreement of May 10, 1926, in the case at bar, Joe May states and Burstein confirms by his signature: "You have stated to me today that you are the General Representative of the Universal Pictures Corporation, or Mr. Carl Laemmle, and have signed today an agreement with Mayfilm Corporation in the name of this principal." The Senate has drawn the conclusion from this, i.e. the Board of Directors in America had knowledge of these actions and consented to them. In view of the correctness of Burstein in business matters, which has been alleged by the Defendant itself, he would have not acted in this manner if he did not know that this was in conformance with the will of the Defendant, given either expressly or impliedly. This can be deduced from his own statements as a witness, when he states "morally" he was authorized to conclude the agreement; apparently he had in mind the contrast to the contents of the Power of Attorney with its detailed provisions and says that they alone are to be considered for the "legal"

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

determination. The "moral" power can only be deduced from the fact that he knew from former transactions, that his principal approved his actions as a representative also in a case as the one above. It is not conceivable that the Board of Directors of the Defendant had no knowledge of the manner in which Burstein called himself on the letterheads, and how he conducted himself in business transactions. It must be taken into consideration that Laemmle is also of German descent, that therefore he was familiar with German conditions. According to Burstein's testimony, he (Laemmle) had already approved the idea in principle to produce films in Germany through May. He, therefore had to figure, and certainly did figure, that Burstein, the only representative in Germany, would take the necessary steps and, if necessary, would conclude agreements which had to do with this production. With what appearance Burstein acted and how the business world considered it, can be judged by the testimony of the editor, Weiner; he says that it was generally known in film circles that the general representatives had all the powers as far as outsiders were concerned, but that in their inner relations they had to submit matters in America for a decision. The witness, Braatz, a man well-versed in this business, testified he would have considered the agreement as concluded, if it were made by Burstein in the name of the Defendant.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Therefore, the Court concludes (the same as the Superior Court) that the Power of Attorney of Burstein for the Defendant was in existence according to the theory of ostensible authority. (theory of legal appearances).

VI. The Superior Court considered the claim to the contractual penalty unjustified, for the reason that May, as representative of the Plaintiff, gave Burstein, as representative of the Defendant, when entering into the agreement, the right to make any reasonable change; that therefore, an agreement of the parties had never been reached in principle, but that the Defendant had the right to cross out of the agreement any onerous provisions; that it was immaterial whether this happened in the presence of May or later; that there was no meeting of the minds regarding such points. The uncertainty which would result from this assumption, viz: regarding which points an agreement had been reached and regarding which points it had not been reached, shows that this consideration is not correct. The entire agreement composed of the so-called main agreement, the side agreement regarding the conditions and the guarantee of Fellner for prompt production and compliance with the price of production, and on the other hand of Fellner and May for compliance with the obligations and the numbers 8, 9 and 17 of the main

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

agreement, must be considered as an entity which belonged together as to its contents. All the documents named were written out at the time by May, in duplicate, were signed by both parties (except the guarantees by which Burstein undertook no obligations for the Defendant) and each party received a copy. If one agreed only "in principle" an agreement regarding all points for which statements were made had not taken place, then Paragraph 154, Civil Code would apply and the agreement could not be considered as being perfected. An agreement in which one party shall be authorized, without the consent of the other to make any changes which he considers reasonable (in case of controversy the Court would have to decide according to Paragraph 315, Seq. Civil Code, whether the changes were reasonable?) lacks the necessary certainty in the opinion of the Senate. The allegation of the Defendant is contradicted by the fact that none of this right was put in writing. One short statement of the Defendant is sufficient: "Universal reserves the right to change." Since nothing like that was included in the agreement, these statements must be construed to mean that the Plaintiff would favorably consider a desire for a change of provisions of the agreement, which would not affect essential parts. May testified as a witness that he made a remark at the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

end that if Defendant desired any changes, he would not be unreasonable and would consider it—or something similar. This was only an informal promise of a later mutual understanding, if wishes for a change would appear, but not concession of a unilateral right to changes. In the interest of certainty of agreements—that would be the interpretation of such right to changes—any wish for changes would have to be stated immediately and by telegraph, but not, as happened here at a time when the contractual penalty was declared forfeited and was demanded. If the right to change had really been granted, it would be effective only for a short space of time, and would have to be exercised immediately. The fact that it was not exercised immediately, speaks against its existence, i.e., against the existence of an intent in this respect. The omission of the contractual penalty cannot be considered an immaterial change. It is irrelevant whether it is customary in such agreements or not. Even if it were not contained in the former draft (which was made for the agreement between the Plaintiff and the finance consortium) May could consider it necessary to insert it in the agreement with the Defendant. It was not a unilateral obligation, the right to sue was given either party which complied with the agreement against the party violating the agreement, i.e., also against the Plaintiff; only in this respect Plaintiff was favored

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

as against the Defendant, as the right to the contractual penalty was given also in case that it withdrew from the agreement because of non-compliance with Defendant's obligations to pay; such right to withdraw was expressly provided for in the agreement (No. 13). These provisions of the agreement prove that the contractual penalty played an important part for the Plaintiff. The crossing out meant a change, which presumably was not within the intent of the Plaintiff, one which could not be considered "reasonable" within the meaning of both parties. Even if one would agree with Defendant's position in other points, Defendant could not be authorized to cross it out unilaterally.

VII. The agreement was conditioned in three ways, as was mentioned in V at 1.

1.) The conditions to 1) and 2) (that the finance consortium did not materialize and that no agreement was concluded with this consortium) interrelated. That these two conditions occurred is not denied,—the consortium did not materialize. The Defendant claims as a defence that the Plaintiff or its representative, May, prevented the happening of these conditions against good faith and morals. For this there has not been sufficient evidence. It is supposed to have consisted in this,—that May did not pay any attention to the formation of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

a consortium. This May does not deny, but the Plaintiff denies that he had to pay attention to this consortium, because it was the business of Burstein and Braatz. The Court agrees with this interpretation. According to the letters, copies of which are filed and which preceded the agreement with Burstein of May 10, 1926 (Exhibits of Plaintiff's pleading of March 23, 1927, which have not been denied, and have been confirmed in various points by Braatz' testimony) the idea to produce several films with May and his corporation for a consortium of a German and American group originated with Braatz, who interested Burstein in this matter. Braatz drew up in advance the agreements to be concluded between the consortium and the Plaintiff. The condition was that the Defendant and some German financiers could come into the finance consortium. Before Burstein's departure for America, a conference between him, May and Braatz had taken place on April 29, 1926, in which the conditions for the production of the film, "Candlesticks of the Emperor" by May and his firm had been laid down in general terms. The other party to the agreement was a consortium, "Burstein-Braatz-Liebenau". May obligated himself to make two more films for the consortium under the same conditions, if Burstein would cable

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

his willingness within fourteen days after his arrival in New York, in May, 1926. May also reserved the right to finance the said film himself, to produce it and to offer it to the consortium. On May 6, 1926, Braatz asked by telegram whether he could meet Burstein in Geneva. Then, on May 8th, announced himself at Burstein's in Paris for the following Sunday, so did May. When May arrived in Paris and called on Burstein, Braatz failed to show up, but could not be reached at the hotel, which he had given as his quarters. May was very angry about that, but feared that the whole plan would fall through, and expressed himself to the effect to Burstein. Burstein had to leave the next day, and therefore, suggested to May to make a contract agreement with the Defendant, in case the consortium planned by Braatz wouldn't materialize. Under those circumstances it cannot be said that May and his firm undertook the obligation to bring the consortium together. It is true they were not allowed to prevent it, because then they would have brought the condition about against good faith and morals. That they took any steps in this direction, has not been claimed by the Defendant. The mere omission to help bring the consortium together is not an action against good faith and morals in the meaning of the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

contract, since May could rely on the fact that Braatz, who had planned the entire matter and who had relations through German financiers, would do the necessary thing in this direction.

Therefore this objection of the Defendant's is also unjustified.

2.) The third condition for the going into effect of the agreement was that Fellner signed the guarantee. This guarantee read:

"To the Universal Picture Corporation
New-York Berlin
care of Mr. Burstein

In my own name as well as in the name of Mr. Hermann Fellner. Power of Attorney, I hereby declare:

Should we have to produce for you, or for a subsidiary company of yours, the motion picture, "Candlesticks of the Emperor", we assume the full liability, a case of force majeure excepted, to the extent of the price agreed upon which is an amount of

including premium—330,000. Mk,

Three Hundred Thirty Thousand Marks, as well as for proper delivery on time three months after the first day of shooting.

Paris, May 10, 1926

JOE MAY"

"H. FELLNER"

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The last signature, that of Fellner, may be found on the document filed in this lawsuit. But the document has been changed, the figure 330,000 was first changed to 350,000 then back to 330,000. Also there is a change on the spot where it reads "30" (thousand marks) of the figures that were written out in letters under the figures 330,000. But it is well possible and probable that it first had read thirty thousand, then was changed to fifty thousand, and then was changed back to thirty thousand. The word is thereby made illegible, also the more since, beside it, the following annotation has been made:

"30,000)
)
10,000)
)
20,000)
)
20,000)"

from which it was supposed to have become clear how the 350.000 came into being; since these figures have not been crossed out in the act of changing this document back again, the document presents a doubt as to which figure is the correct one.

The condition of the contract is indeed to be construed in the sense in which it is interpreted

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

by the Defendant in so far as the Defendant was to be granted certain adequate proof of the assumption of the Guarantee by Fellner. The Defendant assumed that while May was a capable director, he was rather difficult to manage, and that in the first place it was to be feared that the production would become more expensive than budgeted and would take longer than the time agreed upon. This was May's reputation in such circles. Therefore, it appeared necessary to the Defendant, in this case Burstein, to place Fellner in a position beside May and to make him liable, next to May, for a dependable, businesslike, and economic conduct of the production, so that the amount and the time allowed for production would not be exceeded. For this, Fellner received a premium of 20,000 Mk., and May a similar premium of 10,000 Mk; in this way, if the production cost of 300,000. Mk. is added, the figure, 330,000. Mk, came into being. May states that Burstein had held out the prospect to him in Paris that a special premium of a further 20,000. Mk., would be allowed him; and therefore, he regarded himself entitled to change the 330,000. Mk, to 350,000. Mk. This is not stipulated in the contract or in the so-called side agreement containing the terms.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Conversely, it is here stipulated:

"We have further agreed that Mr. H. Fellner and myself shall deposit with your firm in Berlin, the guarantees signed by Mr. Fellner and myself today; on the other hand, you have obligated yourself to make a payment to me of the amount of 25,000, Mk,

Twenty-five Thousand Marks

in cash against this deposition.

"This payment will either be figured into the contracts of the consortium to be concluded with Fellner and myself, or will, if they are not perfected by the 20t, be regarded as part payment of the first installment of the conttact, so that, on the 20th of May, a payment of the balance of 10,000. Mk, would have to be made.

"I ask for confirmation on the enclosed copy as a sign of your accordance with this matter.

"Very sincerely,

"Paris, May 10, 1926.

JOE MAY"

"L. BURSTEIN"

The remaining payment of 10,000. Mk, for May 20th was figured as follows:

15,000.Mk. had already been paid by Burstein for the Defendant at the purchase of the script; therefore, the contract reads, where the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

payments of 50,000. Mk. each are referred to for the first payment:

> "50,000. Mk. to be paid at the conclusion of the contract (15,000 having already been paid for 'Candlesticks')"

If, then, a further amount of 25,000, had been paid before May 20, 1926, at the moment when the document was deposited, the first installment would have been decreased to 10,000. Mk, the rest of the payment the Plaintiff, May, in this case, would have already received.

There can be no question of May's not being permitted to increase the cost of production.

The deposition of the guarantee at the Berlin Branch of Defendant should supply the security that the condition of the signature of Fellner had been complied with. Then the Defendant was to assume an advance payment to May as consideration for the first 50,000. Rm. payment for services rendered. For the effectiveness of the contract of May 20, 1926, it would actually be sufficient for Fellner to sign the guarantee. For this purpose it could not be changed in text, for it was to serve as an evidence for the Defendant by which the Defendant was protected in case of a lawsuit against Fellner in any eventuality. Hereafter, the condition that Fellner sign the guarantee as it was drafted on May 10, 1926, by agreement of the

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

two contract parties, did not take place. But the "condition" is, from the viewpoint of the senate, not to be construed to the effect that the necessary formality could be set aside by the Defendant and Burstein if only the guarantee had gone into effect and was not disputed by Fellner himself. May had Fellner sign the guarantee after having changed the figure to 350,000. Then on May 19, 1926, he deposited this and the other guarantee (for the keeping of conditions as of 8, 9, & 17 of the contract) with his and Fellner's signature at the Branch Office of the Defendant with the employee, Miss Valentine. The guarantee in a changed form he asked to have returned to him on the same day (as he says) or, perhaps, on the next day, and changed the figure back to 330,000. Mk; in this form Miss Valentine then accepted the document and it was thus later presented to the court. Now, on the 18th of May, 1926, May and Fellner telegraphed to Burstein in New York:

> "Confirm option two further pictures Candlesticks conditions immediately included option expires on the 25th.
>
> "Fellner approving May's Paris signature. In case you wish Mahomet direction,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

must be decided before the 20th because of desired arrangement for Candlesticks.

MAY

FELLNER"

From this it was evident to Burstein that Fellner had accepted the guarantee regarding which the signature of Fellner was in question; he could have held Fellner by reason of this telegram. Further, in the testimony of Fellner it becomes clear that he had undertaken the guarantee not only for the amount of 350,000 mk. but also for 330,000 Mk. Legally, Fellner was bound, only the documentary evidence provided for in the contract was not made out in the form prescribed by the contract. Burstein was requested in a telegram of the Plaintiff of May 13, 1926, to instruct the Berlin Branch Office regarding payment of the 25,000 M. Therefore, he had every reason to reassure himself of the correctness of the deposited guarantee. Under certain conditions, the 25,000 M. were to be paid out even before May 20, 1926.

He was obligated in the interest of a compliance with the contract according to its meaning as far as the other side was concerned (also from the point of view of culpa in contrahendo), to give to the Berlin Branch which had to look into the correctness, the necessary direc-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

tion, as to what was necessary and what statements had to be secured. The documents could not be sent to America within the short space of time. It must be considered that the Berlin Branch, according to the contract, was authorized, to make this examination in representation of Burstein who was in America, because, as was known to the parties when they concluded the agreement it had to be made there. Miss Valentine, the local employee of Burstein, who took care of the business of the Berlin Branch, accepted the guarantee in the changed form submitted, without raising objections. Burstein, himself, did not care about the form any further, although he noticed from May's actions (from his telegram of May 14th and the later telegrams in which he demanded payment of 25,000 M.) that May considered the condition 3 of the side agreement of May 10th as complied with. Even later, when Burstein had returned to Europe, he never made any objections to the form of Fellner's Guarantee. According to good faith and morals these actions of Burstein can only be construed to mean that he overlooked the form requirements and approved the Guarantee as given, that the Defendant was also satisfied with the smaller Guarantee (then was granted it in document)

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

which was given her in the telegram of May 18, in which Fellner conformed his signatures and the Paris documents.

Defendant, therefore, cannot raise any objections against the validity of the contract by reason of the failure of the conditions.

VIII. If it has to be concluded that the agreement of May 10, 1926, was binding for both parties that the conditions had taken place or had been dispensed with, the further question is whether the defendant violated the contract, as Plaintiff alleges.

The Senate considers these violations not so much in the failure of payment but in the withdrawal by Burstein from the agreement. The Plaintiff was to produce, for the Defendant, the film, "Candlesticks of the Emperor", the manuscript for which the Defendant had already acquired. According to Paragraph 1 the manuscript was to be submitted to the Defendant for approval. This was so because May, who was to direct the film, was to make changes for the production and they had to be approved by the Defendant before shooting. This, therefore, was not a "condition", upon which the contract would remain invalid, but was a right granted the Defendant for the performance of the work undertaken. In this respect the Plaintiff did not fail to perform because matters did not extend that far.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Paragraph 2 regulates the minimum cost of production (275,000 M)

Paragraph 3 fixes the mutual rights in filling the various roles

Paragraph 4 regulates the time allowed for production (three months)

Paragraph 5 regulates the conditions of payment; 50,000 M.

Upon conclusion of the agreement (since it was to go into effect on May 20th, on that day), then 50,000 M. each on 6/10, 7/10, 9/1, 10/1, 11/1, 1926. This was the consideration for the production of the film under restriction to the distribution in Germany, France, Belgium, and Switzerland.

In Paragraph 6 further consideration on the part of the Defendant has been agreed upon, namely, of the gross income from the distribution in all other countries, in which the Defendant has its own leasing organizations, 8%, in all other countries, 15%, and a guaranteed minimum income from all these countries (except Germany, France, Belgium, Switzerland) of 60,000 M, payable Dec. 1, 1926. Another participation of the Plaintiff was provided for the United States of America.

Paragraph 7 contains a general obligation of the Defendant, to have the interest of the Plaintiff in mind as a party in interest.

Paragraph 8 contains the undertaking of the full Guarantte of the Plaintiff for the 150,000 M. paid

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

during production, 8a.) obligation regarding the negatives, 9) the obligation to pay damages upon exceeding the time for production, 10) relates to insurance of the actors and the *dr*ector, 11) stipulation as to "May-Production" 12) the contractual penalty, 13) Plaintiff's right to withdraw from the contract on account of non-payment, with reservation of the right to the contractual penalty and further damages, 14), jurisdiction (venue) Berlin-Center, 15) exclusion of oral agreements, 16) provisions as to the ownership of the negatives, 17) Guarantee of the Plaintiff not to hypothecate the negative.

After concluding the agreement on May 10, the following transpired:

The finance consortium on which Braatz was working, did not materialize. On May 18th, May and Fellner addressed to Burstein at New York the telegram mentioned above, with the statement that Fellner had joined. In it is mentioned an option for two further films; there must have been such wish expressed by Burstein previously, regarding which nothing had been mentioned. On May 14th, the Plaintiff had already cabled to Burstein to instruct the Berlin Branch as was stated above. On May 19, 1926, the documents were deposited by May at the Berlin Branch, that is, two Guarantees (as appears from the statement of the Defendant

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

without contradiction by the Plaintiff. See Miss Valentine's statement, Exhibit 17 of Defendant's pleading of August 11, 1931), accepted by Fellner, copy of the agreement of May 10, (i.e. the "main agreement") copy of May's letter to Defendant (i.e. the "side agreement" of May 10). Then May's change back to original of one guarantee took place either on May 19th, or, at the latest, on May 20, 1926. On May 20, 1926—the day on which the agreement now went into effect and the Defendant became obligated to pay 35,000 M. of the first installment, a telegram to the Plaintiff arrived: "Confirm arrival letter 28th afterwards payments will be made. Burstein." The Plaintiff awaited the announced letter; it is understandable that they were worried by the telegram because (as was shown to Burstein) there was involved a question of work and the preparations for the productions (keeping up of the office, etc.). According to the Plaintiff's allegations, the letter arrived only on May 31st; according to the Defendant's allegations, it arrived promptly on May 28th. However, that is immaterial. On May 29th the Plaintiff cabled to Burstein: "Letter 28th not yet received. Paris agreement not been complied with by you. Cannot understand. Reserving all our rights with regret." The letter of May 20th, which then arrived, had the following contents: Burstein says

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

he cannot understand May's nervousness; that he is very much interested in the matter. That May inserted in Paris into the agreement at the last moment points, which had not been discussed, that he refused to accept them; that thereupon, May declared upon his word of honor that he would agree to any later change (which Burstein would demand after his return to Europe). That he was now stating that May had obligated himself to engage only English, French stars, besides the first-class German actors, to take in the Opera Ball in Vienna or Berlin, and that the manuscript would have to be approved. That it was understood, since several films were involved, that May would agree to any reasonable demand. That he had a great responsibility to Universal and that he could not submit any agreement which did not comply with the business usages.

That, therefore, he requested May to work further on the preparation of the manuscript; that Burstein would instruct his office immediately to pay him 25,000 M, if May would confirm this letter without reservations; that he reserved the right to refer back to the matter of the Braatz consortium which fell through. That he would start his return on June 3rd. That, therefore, May would receive the fixed price of 300,000 M. for the film, and 30,000 M for the guarantees undertaken by

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

himself and Fellner. That he could not say anything regarding the option, because Laemmle was not in New York. P. S.: That he must have word immediately whether the Braatz consortium had materialized, because otherwise he could come to no decision.

On the same day Burstein wrote to Fellner also and encloses a copy of his letter to May and asks him to use his influence with May; that he would not see any delay caused by him because May could not get ready with the manuscript before June 10 and that then he would be in Berlin himself; that he had the best intentions and hoped that he would find understanding and courtesy from the other parties.

In the opinion of the court this letter constitutes a cancelation of the contract. It is written in the most polite terms and with the expression as if Burstein still had the greatest interest in the matter and wanted to further it as much as possible. On the other hand, it contains the demand to the other party that he should agree to any possible change of the provisions agreed upon. The Plaintiff was not obligated to do that in any way. The Plaintiff could not do it without being completely in the hands of the other party and renouncing its rights under the agreement. The Plaintiff was asked to acknowledge that the written agreement of May 10th, which was executed by signatures of both parties, with its

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

side agreements and provisions, did not exist legally. If it did so, Plaintiff was from then on entirely dependent upon the voluntary courtesies of the other side. This would not have been dangerous under certain circumstances if a minor matter or a small object was involved. Here there was in issue for the Plaintiff considerable values, it was liable to suffer serious economic damage if after Burstein's return to Europe unacceptable changes were demanded. If one assumes, as the Senate has, that the agreement was binding for both sides, the letter of May 20th constitutes a withdrawal from the contract, a positive violation of the agreement, and it is immaterial whether the agreement was also violated by failure to comply with the obligations to pay, and whether in this respect the Defendant could set forth the excuse that it had no knowledge of the occurrence of the conditions, so that payment was not made for reasons for which it was not liable. Regarding the withdrawal from the contract in the manner in which it was done by the letter of May 20, 1926, the Defendant is liable therefor; with due diligence the Defendant should have realized that the agreement had been duly perfected, the Defendant cannot bring up the excuse of lack of legal knowledge.

The Plaintiff cabled after receipt of this letter of June 1, 1926, that the letter was unacceptable.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

"Inasmuch as the finance consortium has not been formed until the 20th, the Paris agreement has gone into effect. This agreement alone and solely is binding for us. Agreed payment has not been made. Must reserve all our rights. Mayfilm." To this Burstein replied from the boat that Joe May's standpoint was "unjust" (he meant unjustified).

On June 7, 1926, two letters were written, by the Plaintiff to Burstein, Universal Films, in Paris, (where Burstein had arrived meanwhile): that the conditions which had been agreed upon in the contract had not been complied with by Burstein; that the Plaintiff was obligated to withdraw from the agreement entered into; that all further rights were reserved. At the same time May, personally, wrote to Burstein that he had long endeavored to come to an agreement with him, that he finally went to Paris and concluded the agreement, that he went away from there, convinced that matters with Burstein were in order. That he regretted that the written agreements had not been complied with, that he only awaited the announced letter of the 20th under reservation of his rights; that he was surprised about the contents thereof and recognized that Burstein did not intend to comply with the written stipulation of the agreement. That he had given his word of honor that he would assist Braatz with the consortium but that this only applied to May 20th; that he kept his promise but heard noth-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

ing from Braatz. If Braatz had complied with the agreement and had made different proposals to him after his return, he would not have been inhuman and would have shown him consideration. That thus he lost valuable weeks. That he did not know what to think of the whole affair but that he could not jeopardize his whole existence. That after receipt of the letter of May 20th, he started other negotiations, in order not to let the damage get larger, and that finally he made a production agreement with Phoebus. That he requested an early conference.

Burstein replied from Paris and maintained his viewpoint that he was authorized to demand the changes, because May *conced* him in Paris, after the agreement was signed, when it was pointed out to him, that the agreement did not conform with the previous discussions, but contained conditions more favorable to May. That May was principally interested to get a contract, that he (Burstein) got it through, and that he did not see any reason why May refused to carry out the contract; that he should have set a time limit before withdrawing. Burstein came to Berlin after June 18, 1926, and a conference took place between him and May, which, however, did not lead to any accord. In July the Plaintiff made claim to the contractual penalty.

May concluded the agreement with the Phoebus Corp., not on June 7th, as he writes on June 7th,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

but on June 4th; the contract is in evidence (Exhibit to pleading of June 27, 1932, Page 118, Vol. III of the file).

These letter*d* do not constitute an excuse for the Defendant, because it did not relinquish its demand to make any desirable changes, but endeavored only to prove to May the correctness of their viewpoints. It could not be expected from May and the Plaintiff any *moe* to give into that. In order to safeguard production for the year in question and in order not to lose the time, it had to act quickly and to make its decisions. Otherwise, the danger was that it would "sit between two chairs" and expose itself, in view of Burstein's interpretation of the right of the Defendant to make changes. to too great a danger that the written stipulations, which were binding, would be changed un*li*aterally to its disadvantage. It was therefore justified to enter into the agreement with Phoebus, which offered certainty and not to await an accord with the Defendant, which finally might not materialize, in spite of all Burstein's nice words. It cannot be said that by Burstein's *leter* statements of June 10th, the letter of May 20th found an explanation which would take away from it the withdrawal from the contract. According to the whole structure of the agreement, the matter was to be finished quickly, that is shown in the comparatively short period of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

time to May 20th, which was stipulated for the question of the going into effect of the agreement which is not denied. Both parties agreed that the Plaintiff should see clearly, quickly, and be in a position to produce; as a counterweight, certain time limits and orders were given it for the production. The Defendant or its representative Burstein saw that a quick termination was of greatest interest to the Plaintiff; that was the meaning of the agreement. The delay and the demand to allow later changes, as expressed in the letter of May 20th, constituted a violation of the agreement by which, as Burstein could realize, material interests of the Plaintiff were affected.

Accordingly, there was a willful violation of the agreement on the part of the Defendant and thereby the conditions for the forfeiture of the contractual penalty were fulfilled.

In this connection it remains to discuss whether the agreement contained a logical uncertainty. It provides in Paragraph 13) that the Plaintiff has a right to withdraw from the agreement upon non-fulfillment of the obligation to pay; that would be a right of contractual rescission—exceeding the legal rescission provided in paragraph 326 of the Civil Code—and it is in accord with logic (and the prevailing opinion of law, Staud. to paragraph 340 II, 2) that upon declaring a *re*cission the right to a

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

contractual penalty ceases because it is connected with the agreement. Here a rescission was used. It is also provided in paragraph 13) that in any event the claim to a contractual penalty which has become due and to further damages is reserved. By this, the "declaration of withdrawal", which took place within the meaning of this agreement lost the usual character with the consequences of paragraphs 327, 346, Seq. Civil Code, it simply had the meaning of a refusal to perform, a termination of the obligations existing on the part of the party entitled to it. Inasmuch as a reason for the contractual penalty and the liability for damages on the part of the Defendant is not based on the failure to make the payment on May 20th, but in the withdrawal from the agreement, application of Paragraph 13) of the agreement with its right of "rescission", provided therein, is not in question, rather the contractual penalty of paragraph 12) is demanded by the party complying with the agreement against the party violating the agreement. The contractual penalty partakes of the character provided for in Paragraph 340 of the Civil Code, that is, is demanded instead of performance as minimum damage (Paragraph 340, Subd. II, Civil Code). The complaint asking for payment of 50,000 Rm, is therefore justified with the exception of interest, which can be granted only at the rate of two per cent above the Reichsbank discount as interest for

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

delay. In this respect, the judgment appealed from is changed by the appeal of the Plaintiff.

IX) The cross-complaint for declaratory relief demands the declaration that the Plaintiff is not entitled to damages in excess of 50,000 M. The complaint for negative declaratory relief is admissible according to Paragraph 256, Code of Civil Procedure. It is justified.

In Principle the claim for damages of the Plaintiff is justified according to the foregoing reasons: It is based upon the contract and also upon Paragraph 326, Civil Code; setting of a time limit is not required, because later performance had no interest for the Plaintiff, in order not to lose its production for the year had in the meantime to conclude the Phoebus agreement, therefore could not fulfill the agreement with the Defendant which would have to be performed in the same time period. This decision had to be made on account of the violation of the agreement by the Defendant. The conditions of Paragraph 326 of the Civil Code apply therefore. The Defendant's allegation that the Plaintiff violated the agreement by the Phoebus contract and that it exercised its contractual rights only in order to get free and was better off with the Phoebus agreement is incorrect.

It cannot be ascertained, however, that the Plaintiff suffered damages in excess of 50,000 M. As an exhibit to the pleading of January 24, 1931, (II.124

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

of the file) a computation of damage has been made. The main item therein (100,000 M lost profit in re Deutsches Lichtspieltheater) is not justified, it does not appear how such profit was a consequence of the non-compliance by the Defendant. Furthermore, expenditures for unkeep of the office and preparations for the time prior to May 10, 1926, cannot be demanded. There are soliciting costs which are made with a view of making a desired contract, for which there is no obliagtion, and for which everybody assumes his own risk. They did not originate by reason of the non-fulfillment by the Defendant. The same applies to May's expenditures for the trip to Paris. Accordingly, so high a proportion of the calculated damages is unjustified that at the most about 20,000 M. are justified, that is, much less than 50,000 M. Lastly, if the contract (Paragraph 6c) speaks of a Guarantee of 60,000 Rm, which is to be paid by the Defendant, this only applies in case the film turned out well and was distributed by the Defendant successfully in the above-mentioned countries. That this would be the case, cannot be assumed as probable, it happens too often that films have so little box office attraction, that their distribution stops; an unconditional right to this 60,000 M was not granted to the Plaintiff by the agreement.

The Court also assumes this by reason of the fact that the Plaintiff itself does not mention this point

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

in its tabulation of damages. Furthermore, the Plaintiff averted the main damages by reason of the fact that it entered into the Phoebus agreement, which admittedly netted it a profit of 20,000 M.

The Defendant's appeal was therefore also justified and the cross-complaint had to be granted.

The decision regarding costs is based on paragraph 92, Code of Civil Procedure, the decision regarding temporary execution on Paragraphs 708, 713, Code of Civil Procedure.

(signed) VOSS

President of Senate Heuching and District Court of Appeal Judge Kleine are on vacation and therefore are unable to affix their signatures.

(signed) VOSS

[Seal of the District Court of Appeal, Berlin]

Certified

Berlin, Sept. 5, 1932

[Signature Illegible]

recording clerk of the District Court of Appeal.

This judgment is final. Berlin, June 29, 1939.

The Clerk's Office of the Superior Court.

SCHIRN

Inspector of Justice

As Keeper of the Record of the Clerk's Office of the Superior Court.

[Seal of the Superior Court Berlin.]

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Certified Copy.
VII 324/1932.

DR. PAUL DIENSTAG
DR. FERDINAND BANG
Attorneys.

Received February 28, 1933
Enclosures.

*J*n the name of the Reich!
(Eagle)

Rendered:
February 3, 1933
(Signed) MERCK
Government Inspector as recorder of the office of the court.

*J*n re

Universal Pictures Corporation in New York represented by the Board of Directors, defendant, cross complainant, Respondent & appellant.

Counsel:
Attorney Counselor of Justice
DR. SCHROEMBGENS in Leipzig

versus

May-Film Corporation in Berlin, now in liquidation, represented by its liquidator
Plaintiff, Cross-defendant, Respondent and Appellant

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Counsel:

Attorney

DR. FUCHSLOCHER in Leipzig

the Supreme Court Civil Senate VII after oral hearing of February 3, 1933 by Supreme Court counselor Dr. Freiesleben as Presiding Judge. Supreme Court counselors Baron von Richthofen, Dr. Schack, Dr. Krueger and Oesterheld has adjudged:

The appeal and the joint appeal against the judgment of the District Court of Appeal at Berlin of July 27, 1932 are denied.

The costs of the appeal are assessed 2/5 to the defendant 3/5 to plaintiff.

According to the law.

Facts.

L. Burstein, businessman was the manager of a branch of the defendant in Berlin, which according to the German law had its own legal personality—a Limited Corporation—On May 10, 1926 Burstein was in Paris, whence he was to go to the United States for a temporary stay. After telegraphic announcement then a member of the board of directors of the plaintiff, film director Joe May of Berlin, went to Paris. According to the allegation of plaintiff an agreement was en-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

tered into on the said day between it, represented by Joe May and the defendant which was represented in the negotiations by Burstein, its general representative. Accordingly they were to produce a film under the direction of Joe May based upon an original manuscript of a novel acquired by defendant from a third party "lustre of the emperor" under that title and to deliver it 3 months after the first day of filming provided certain conditions agreed upon in a written side agreement would have happened until May 20, 1926, to-wit:

1.) failure of formation of a finance committee for financing said film.

2.) failure to make certain agreements regarding the production of the film with this finance committee under guarantee of defendant.

3.) Confirmation of the written guarantee of the businessman Fellner undertaken in writing by Joe May in behalf of Fellner in Paris by affixing the signature of Fellner to the two documents issued in Paris, which were to *he* deposited after signature by Fellner at the branch office of defendant in Berlin. Provided these conditions had happened the defendant was to take over the distribution of the film "Lustre of the emperor" in Germany, France, Belgium and Switzerland for a period

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

of 7 years against payment of a fixed sum of 30,000 Marks and for the rest of the world under the condition, that the defendant would receive from the gross income of the rental to the plaintiff certain percentages, with a guaranteed minimum of 60,000 Marks, payable December 1, 1926.

Plaintiff alleges that the conditions under 1. 2. 3. happened and that therefore the agreement of May 20, 1926 went into effect; that the finance committee was not organized on May 20, 1926 or later, it therefore could not enter into the contemplated agreements. That the two documents regarding the guarantee of Fellner for the compliance of certain provisions of the contract and for prompt production of the film within the limit of the agreed price of 300,000 Marks including bonus, with reservations of "acts of God," were signed within the time limit by Fellner and deposited by Joe May at the branch office of the defendant in Berlin.

Regarding the consummation of the alleged agreement plaintiff refers to a document signed by Joe May and Burstein dated Paris May 10, 1926 which consists of several loose pages which have the signature of May but not of Burstein affixed in the margin. At the beginning this document is named "agreement" between May Film

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Corporation and Universal Film Corporation New York, branch office Berlin, represented by Mr. Burstein as general representative of Universal.

In paragraph 12 of the "agreement" it is stipulated that in case of violations of the contract the party violating the contract should pay the party conforming with the contract a contractual penalty, not subject to judicial reduction, in the amount of 50,000 Marks, without prejudice to further claims of damages. In paragraph 13 of the "agreement" it is stipulated that non-compliance with the terms of payment shall entitle the plaintiff to cancel the agreement with forfeiture of the payments made until then and that the right to the contractual penalty and further damages shall not be affected thereby.

The "agreement" was made in 2 copies, one of which was taken by Burstein to the United States, the other received by Joe May.

Claiming that defendant did not comply with its obligation to pay—the first instalment of 35,000 Marks,—up to May 20, 1926, but abrogated the contract by a letter of Burstein from New York on that day making compliance with the contract dependent upon further conditions, contrary to the agreement, plaintiff prays in this suit to order the defendant to pay the contractual penalty of 50,000 Reichsmarks with interest, reserving further claims for damages.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

It is not disputed that on June 1, 1926 plaintiff cabled to Burstein at New York after receipt of the letter of May 20, 1926 "Letter not acceptable. Since finance committee was not formed to the 20th, Paris agreement in effect. This agreement solely binding for us. Agreed instalment not paid we reserve all our rights May-Film." On June 7, 1926 plaintiff wrote to Burstein, who at that time was on the return trip from the United States to Paris that it was obliged to cancel the contract, because the agreed conditions were not complied with on his part and that it reserved all further rights.

Defendant prays that the complaint be denied and by way of cross-complaint asks that it be determined against the allegations of complainant, that by reason of non-compliance with the Paris agreement it sustained damages in the amount of 142,000 Reichsmark, determination that the plaintiff has no further claims for damages as alleged, because a binding agreement was not consummated and that the conditions did not happen, from which the right of plaintiff to demand the contractual penalty and damages depend, and because the plaintiff, which on June 4, 1926 entered into a more favorable contract of production with Phoebus Film Company violated the agreement itself and did not suffer any damages whatever.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The Superior Court denied the complaint and cross-complaint. The District Court of Appeal upon appeal of both parties decided in favor of the complaint, denying further claims for interest and deciding according to the prayer in the cross-complaint. Defendant filed an appeal against this judgment which plaintiff joined after time for appeal had expired. Defendant prays that the judgment of the appellate court as far as it is against it be reversed and that it be decided according to its prayer in the appellate court. Plaintiff by joining the appeal again prays that the cross-complaint be denied. Both parties ask that the appeal of the opponent be denied.

Grounds for decission.

The appeal and the joint appeal are not justified.

10/21/36.

A. Revision.

I.

The Appellate Judge assumes that German Law will govern the case at bar because the agreement provided for German Jurisdiction and a German place of performance and payment. The revision appeal does not consider this correct because in the first place the question whether an agreement was consummated at all is in controversy, and the subjection of the parties to the German law depends upon that. The Appellate Court must

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

be upheld however in the result. When in negotations about an agreement between a German and an American Company the agreement is contemplated in such a way that both parties are to perform the agreement in Germany and that controversies arising out of the agreement are to be decided by a German Court, the principle must be assumed, that according to the intention of the parties the question whether the agreement was consummated, must be subject to German Law. The defendant therefore cannot under the American law benefit by the fact that Burstein, in contrast to May did not sign the single pages of the main agreement with his name.

II.

The revision appeal is directed against the finding of the Appellate Court that condition No 3 of the side agreement of May 10, 1926 regarding the consummation of the main agreement has not been fulfilled. It claims violation of paragraphs 133, 157 Civil Code.

The claim is not justified.

The guarantee in question, drawn up in Paris, which was to be signed in Berlin by Fellner up to May 20, 1926 read as follows:

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

"To Universal Pictures Corporation
New York, Berlin
c/o Mr. Burstein.

In my own name as well as in the name of Mr. Hermann Fellner by power of attorney I declare the following:

In case we have to produce for you or a company closely connected with you the film "Lustres of the Emperor" we assume full guarantee for the production within the limits of the agreed price of 330,000 Marks—three hundred thirty thousand Marks—including bonus and the prompt delivery three months after the first day of filming except for acts of God.

Paris May 10, 1926
(Signed): JOE MAY."

The Appellate Court found by inspection that in this document the figure 330,000 was first changed to 350,000 and changed back to 330,000. That the letters in the word giving the amount next to the figure 330,000 had also been changed. That it may very well be possible and likely that at first there was written three hundred thirty thousand, that the part of the word "thirty" was changed to "fifty" and later again changed back to "thirty". The Appellate Court finds that the word written in letters had become illegible thereby,

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

also that the figure gave rise to confusion, particularly as besides it was made a statement:

300,000
10,000
20,000
20,000,

from which one could see how the sum of 350,000 Marks was arrived at. Since this statement was not crossed out, the document is ambiguous as to what figure is correct.

Regarding the changes, the Appellate Court finds that May did not have authority, to increase the production sum. In spite of that he had Fellner sign the declaration, after changing the figure to 350,000. That then on May 19, 1926 he turned over to Miss Valentin, employee of the defendant in the Berlin branch this and the other guarantee signed by Fellner (guarantee of fulfillment of the conditions 8, 9, 17 of the agreement). That he had the changed declaration returned to him on the same day or the next day and that he changed the figure back to 330,000. That Miss Valentin took over the document in this form. On May 18, May and Fellner cabled to Burstein at New York: "Fellner joins Paris May signature." From this it was apparent to Burstein that Fellner accepted the declaration of guarantee. That he could also hold Fellner responsible on account of the cable. That

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

the testimony of Fellner proved that he "had" given guarantee not only for the sum of 350,000 Marks but also for the sum of 330,000 Marks, that therefore Fellner was legally bound. Only the documentary evidence was not in the form provided for in the contract. The deposit of the guarantee at the Berlin branch gave the defendant the certainty that the condition of Fellners signature had been fulfilled. The defendant by reason of this deposit was obligated to make an advance payment of 25,000 Marks on account of the first instalment payable according to the agreement. That the signature of Fellner was sufficient to put the agreement of May 20, 1926 into effect, but that the document must not be changed in its text as it was to serve as evidence for the defendant, by which it would have been protected in any event if a law suit against Fellner had to be instituted. That therefore the condition that Fellner sign the guarantee, as drafted by consent of both parties, had not been fulfilled. That the condition was not such that formalities could not be overlooked as long as the guarantee had actually taken place and was not denied by Fellner. That Burstein had already been requested by cable from plaintiff of May 13, 1926 to instruct the Berlin branch regarding the payment of 25,000 Marks. That therefore he had good reason to satisfy himself regarding the correctness of the guarantee

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

to be deposited. Under certain conditions the 25,000 Marks were to be paid before May 20, 1926. In the interest of a logical execution of the agreement Burstein was under obligation to the other party of the agreement, to give the proper instructions to the Berlin office, which had to pass on the correctness of the documents, what was involved and how the declarations should have been, because the documents could not be sent to the United States in the short time. That according to the agreement the Berlin branch must be considered as empowered to make this check in behalf of Burstein while in the United States, because it could not be made by any other office, as the parties realized when entering into the agreement. That the local employee of Burstein, Miss Valentin who took care of the business of the Berlin branch, accepted the declaration in the present changed form, without objecting to it. That Burstein did not pay further attention to the form, although he noticed from May's actions that he (May) considered condition No 3 of the side agreement fulfilled.

That later when he returned to Europe he never objected to the form of Fellner's guarantee. That this conduct of Burstein could, according to faith and equity, only be so construed that the requirement of form was waived and that the defendant was satisfied with the lower surety which was avail-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

able to it by the cable of May 18.— That therefore defendant could not raise any objection to the validity of the contract on account of non-compliance with condition No 3.

The revision appeal replies to these arguments that they overlook the fact that defendant's situation was worse by 20,000 Marks. If the defendant had held Fellner responsible on account of the cable of May 18, 1926 it would have faced not only the objection that it was a guarantee, the form of which had not been complied with, but also the objection that Fellner did not obligate himself by the cable to anything more than the declaration in the form in which he signed it when it was presented to him, that is to guarantee the production of the film at a cost of 350,000 Marks. If the Appellate Court presumed from the testimony of Fellner that he undertook the guarantee not only for the sum of 350,000, but also for 330,000 Marks, the defendant would not be bound by any later declaration of the witness, because the clear and unequivocal condition No 3 of the side agreement had not been fulfilled. That the finding of the Appellate Court that Miss Valentin accepted the declaration in the form submitted without objecting, has no legal effect. That Miss Valentin knew nothing about the agreement of May 10, 1926 and the wording of the declaration of guarantee as actually agreed upon.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

That it is erroneous that the Appellate Court drew conclusions from the fact that Burstein did not object to the form of the guarantee after his return to Europe. It should be noted that at the time when Burstein returned, plaintiff had already cancelled the agreement by its declaration of June 7, 1926, that even before, on June 4, 1926 it entered into the Phoebus agreement. Burstein's silence could therefore not be construed as approval of the document according to faith and equity.

These arguments of the revision appellant are at variance with the findings of fact of the Appellate Court in its essential points.

They mean that Fellner had knowledge of the change in the document by Joe May—350,000 to 330,000—before the end of May 20, 1926 and that he consented to it, also, that the corrected document was returned to the Berlin branch of the defendant on May 20, 1926—if not on May 19, 1926. Otherwise the Appellate Court could not have stated that Fellner "had" guaranteed not only for the sum of 350,000 but also for 330,000 Marks. The objection of the revision appellant that the substantive rights of the defendant were impaired to the extent of 20,000 Marks was not justified even in case Fellner's declaration was a guarantee and required written form according to paragraph 766 Civil Code because Fellner was not a "Commer-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

cial man", paragraph 350 Commercial Code which waives the form requirement of paragraph 766 Civil Code under the conditions stated therein, and therefore did not apply to his declaration. Legal doubts regarding the validity of a guarantee in the declaration of Fellner cannot be deducted from the fact that he did not sign the changed document. (see: Supreme Court Decision of January 14, 1911 V 88/10 R G Z. Vol 57 p 68) As has previously been mentioned he consented to the change. From the point of view that May and Fellner had no longer the right to make disposition of the document which had been delivered, objections cannot be raised because Miss Valentin handed the document back to May and accepted it again after the change had been made without objecting to the change. There is no legal error in the finding of the Appellate Court that the Berlin branch was authorized to examine the documents. It could then hand the document to Joe May for corrections. The fact alone that the document was imperfect extrinsically and might give rise to doubt, as to which figure is correct, does not speak against the compliance with the legal requirement of written form. Such doubts occur frequently in documents which are difficult to read without affecting their validity. Such doubts would be easy to clear in view of the consent of Fellner which the Appellate Court found regarding the time in question.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

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Plaintiff's Exhibit No. 2—(Continued)

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(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

zation of the finance committee—It sees in the letter of Burstein of May 20, 1926 a repudiation of the agreement, a positive violation of the agreement. The Appellate Court does not pass on the question of the necessity of setting a time limit, only in discussing the cross-complaint. It denies it because the plaintiff had no interest in a later performance. That it had to accept the Phoebus agreement immediately in order not to lose its production for the year, although it could not perform both agreements.

The revision appellant maintains that Burstein's letter of May 20, 1926 could not be construed as a positive violation, a definite repudiation of the agreement. That the plaintiff apparently did not consider it as such, because it did not immediately, but only on June 7, 1926 cancel the agreement and then only for failure to make payment, which was excused by the Appellate Court. In any event an additional time limit should have been set, as it is incorrect that the interest of the plaintiff in the performance of the agreement had ceased on account of the letter of May 20, 1926, as was shown by the fact that the plaintiff cancelled the agreement only with the letter of June 7, 1926. That there was no reason why the defendant could not have set an additional time limit on June 1, 1926, even if only of a few days. That the Appellate Court confused Nos 12 and 13 of the agreement.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

That it overlooked that plaintiff was entitled to the contractual penalty under paragraph 12 only if it did not cancel but adhered to the agreement. That, furthermore, plaintiff violated the agreement by entering into the agreement with Phoebus on June 4, 1926, thus making it impossible for it, to perform the agreement with the defendant.

The Appellate Court applied paragraph 326 Civil Code to the contractual relations in question. There are no legal objections against that or against the finding of a positive violation of the agreement. The latter means not immaterial violations of an agreement, which consists neither of delay nor responsibility for impossibility of performance. Their basis is the consciousness that the agreement does not only require the promised performance but imposes on the debtor the duty not to do anything detrimental to and irreconcilable with the purpose of the agreement in the meaning of paragraph 242 Civil Code. If he violates the obligation not to do certain things he is liable for the resulting damage.

If he jeopardizes the purpose of the agreement in such a way that according to faith and equity the other party cannot be expected to stand by the agreement, the latter has the rights under paragraph 326 Civil Code, i.e. he can either cancel the agreement or declining acceptance of performance demand damages for non-performance.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

The Appellate Court which on the complaint had to decide about the right of plaintiff to demand the contractual penalty under No. 12 of the Paris agreement, had to examine whether the defendant violated the agreement and whether plaintiff complied with the agreement. It decided both questions affirmatively upon the facts. In doing so it adopted the principle developed in the jurisdiction of the Supreme Court that a refusal to perform declared before the time for performance puts into effect the rights of the other party given in paragraph 326 Civil Code that setting of an additional time limit or a warning is not necessary under all circumstances. The Appellate Court explains without violation of any principles of law, in view of the nature of the production situation of plaintiff and the special nature of its customers, why further waiting could not be imputed to plaintiff and why defendant could not expect such further wait. That is the meaning of its statements, that plaintiff had no further interest in the performance of the agreement. It took into consideration the wording of the letter of May 20, 1926 which outwardly was obliging, but decided that the letter in fact contained a renunciation of the Paris agreement. The Appellate Court does not consider a change of mind by plaintiff entirely impossible. This however does not contradict its findings. Such change of mind is conceivable with the change of human decisions

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

and does not exclude the renunciation of the agreement found by the Appellate Court. All of this is passing on facts of the case which cannot be attacked in the revision appeal with legal grounds. Attacks upon the procedural foundation cannot be made since the emergency order of June 14, 1932 went into effect as is recognized by the revision appellant.

The revision appeal claims that the letter from Burstein of May 20, 1926 did not constitute a renunciation of the agreement for the reason that Burstein in a postscriptum to this letter wrote:

> "It is imperative to know immediately whether the Bratz Committee has been formed or not; otherwise I cannot make any decision, in which direction I have to inform myself, which I hope you will understand."

and because May cabled to Burstein only after receipt of this letter on June 1, 1926 that the finance committee had not been formed to May 20. That Burstein knew only through this cable that the condition enumerated under No. 1 of the side agreement for the going into effect of the agreement had taken place.

This position of the revision appeal is not justified. It is true that the Appellate Court, as mentioned before, is inclined to excuse the non-payment of the first instalment on the ground that at that

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

time defendant did not know that the finance committee had not been formed. From this it is not to be deduced that it also considered the renunciation of the agreement in the letter of May 20, 1926 excused and denied the existence of a positive violation of the agreement. There is a difference between claiming a right to various changes of a consummated agreement—that is the understanding of the letter of May 20, 1926 by the Appellate Court, —and failing to make a payment, of which one assumes, the time for performance has not yet arrived. A contradiction in the statements of the Appellate Court is not to be found.

It must be conceded to the revision appellant that in principle is part of the essence of a positive violation of an agreement that the violator is conscious of the violation of the agreement. However, the finding of fact by the Appellate Court shows without doubt that this was the case. One cannot therefore concur with the revision appellant, when he tries to claim that the only reason for the "cancellation" of the agreement by the plaintiff was the failure to pay, which the Appellate Court considered as excused.

Neither can the revision appellant be successful with its claim that the plaintiff violated the agreement first by entering into the Phoebus agreement before its "cancellation" and therefore made it impossible to perform the Paris agreement. It is true

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

that the declaration of "cancellation" is to be found not in the cable of June 1, 1926 but in the letter of June 7, 1926 and that the Phoebus agreement according to the findings of the Appellate Court was entered into on June 4, 1926. However it is not true that the plaintiff violated the agreement with plaintiff (apparent mistake: defendant) by entering into the executory Phoebus-agreement. The plaintiff could, after being forsaken by the defendant make different arrangements for taking care of production and therefore enter into the Phoebus agreement before the formal declaration of "cancellation". Possibly it acted upon its owen risk if the defendant before the declaration of "cancellation" had adhered to the agreement and complied with it. But this did not happen and therefore need not be discussed. Besides, the revision appellant overlooks the fact, that in a legal sense the plaintiff did not "cancel" the agreement, but that by refusing to accept performance it reserved its rights under the agreement including its right to the contractual penalty. This disposes also the claim of the revision appellant that the District Court of Appeal confused No's 12 and 13 of the Paris agreement and misinterpreted that under No. 12 plaintiff had the right to the contractual penalty only, if it did not "cancel". If the revision appellant means that the plaintiff could not demand the contractual penalty, even if it de-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

manded damages for non-performance, but had to prove damages first, such claim is to be denied in view of the opposite interpretation by the Appellate Court which is possible and does not violate any legal provisions.

B. Joint revision appeal.

In principle the District Court of Appeal upholds the right of the plaintiff to damages. It states, however, that it cannot be ascertained, whether the plaintiff suffered damages in excess of the contractual penalty of 50,000 Reichsmark. In doing so the Appellate Court examines various items of the statement of damages in the amount of about 120,000 Reichsmark and denies them each separately for reasons which the joint revision appellant does not discuss. Then the Appellate Court goes on that the Paris agreement mentioned a guarantee of 60,000 Reichsmark in No. 6. This guarantee applied only in case the film was a success and would really be exhibited in the countries enumerated. That this would be the case, could not naturally be considered as probable. That it very frequently happened that films did not have drawing power so that their exhibition would be prevented. That an absolute right to the 60,000 Reichsmark was not to be conferred by the agreement. That the Court came to that conclusion also by the fact that the plaintiff itself did not mention this item in its statement of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

damages. Furthermore the plaintiff averted the principal damage by entering into the Phoebus contract which admittedly brought a profit of 20,000 Reichsmark.

The joint revision appeal claims violation of the substantive law, particularly of paragraphs 133, 157 Civil Code. It claims that the guarantee undertaken in paragraph 6 c of the Paris agreement was not different from the guarantee for the producer customary in such film contracts, that it therefore would have to be paid without any further conditions having previously been complied with. That the opposite opinion of the District Court of Appeal is arbitrary and contrary to the principles of interpretation in civil law. That the opinion of the District Court of Appeal that the plaintiff averted the damage by entering into the Phoebus contract is also erroneous. That the District Court of Appeal overlooked the fact that the Phoebus contract was entered into by Joe May personally, not by the plaintiff.

The objections are not justified. If there is a controversy between the parties as to whether damages have been sustained and as to the amount of damages or of an interest to be compensated the court decides according to its own discretion taking into consideration all the circumstances. Such is the case at bar.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

manded damages for non-performance, but had to prove damages first, such claim is to be denied in view of the opposite interpretation by the Appellate Court which is possible and does not violate any legal provisions.

B. Joint revision appeal.

In principle the District Court of Appeal upholds the right of the plaintiff to damages. It states, however, that it cannot be ascertained, whether the plaintiff suffered damages in excess of the contractual penalty of 50,000 Reichsmark. In doing so the Appellate Court examines various items of the statement of damages in the amount of about 120,000 Reichsmark and denies them each separately for reasons which the joint revision appellant does not discuss. Then the Appellate Court goes on that the Paris agreement mentioned a guarantee of 60,000 Reichsmark in No. 6. This guarantee applied only in case the film was a success and would really be exhibited in the countries enumerated. That this would be the case, could not naturally be considered as probable. That it very frequently happened that films did not have drawing power so that their exhibition would be prevented. That an absolute right to the 60,000 Reichsmark was not to be conferred by the agreement. That the Court came to that conclusion also by the fact that the plaintiff itself did not mention this item in its statement of

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

damages. Furthermore the plaintiff averted the principal damage by entering into the Phoebus contract which admittedly brought a profit of 20,000 Reichsmark.

The joint revision appeal claims violation of the substantive law, particularly of paragraphs 133, 157 Civil Code. It claims that the guarantee undertaken in paragraph 6 c of the Paris agreement was not different from the guarantee for the producer customary in such film contracts, that it therefore would have to be paid without any further conditions having previously been complied with. That the opposite opinion of the District Court of Appeal is arbitrary and contrary to the principles of interpretation in civil law. That the opinion of the District Court of Appeal that the plaintiff averted the damage by entering into the Phoebus contract is also erroneous. That the District Court of Appeal overlooked the fact that the Phoebus contract was entered into by Joe May personally, not by the plaintiff.

The objections are not justified. If there is a controversy between the parties as to whether damages have been sustained and as to the amount of damages or of an interest to be compensated the court decides according to its own discretion taking into consideration all the circumstances. Such is the case at bar.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Before the passage of the emergency order of June 14, 1932 the revision appeal could have raised such objections if it could prove at the same time that the Appellate Court misunderstood or exceeded the limits of its discretion. After the passage of the emergency order of June 14, 1932 an objection to the violation of paragraph 287 Code of Civil Procedure is not permissible any more. It cannot be raised either within the purview of paragraph 287 Code of Civil Procedure as a violation of the substantive law, e. g. the principles of interpretation.

C.

Revision appeal and joint revision appeal are therefore to be denied and are denied.

(Signed):

DR. FREIESLEBEN
FREIHERR von RICHTOFEN
SCHACK
KRUEGER
OSTERHELD

Issued

(Seal) Signature

Government Inspector as recorder of the Court.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

Total value of the subject matter in the revision appeal 50,000 -|- 75,000 = 125,000 RM.

Of this amount is

1.) Revision of defendant 50,000 RM.

2.) Joint revision of plaintiff 75,000 RM.

taxed by order of February 3, 1933

I, the undersigned, do hereby certify that I am, at the date hereof, an official in the Clerk's Office, Department 100 of the Superior Court Berlin, and am the legal keeper of the official records of the aforesaid Superior Court, that I have compared the foregoing photostatic copies with the original records and documents in that certain action entitled Mayfilm A. G. Berlin W. Tauentzien Street 14

versus

Universal Pictures Corporation, New York, 730 Fifth Avenue, file No. 74.0.590/26, on file in this Court and now in my possession, and that the same are and each of them is, true and correct copies of the originals. That the judgment of the Superior Court Berlin dated March 4, 1930 has been superseded by the judgment of the District Court of Appeal of July 27, 1932, file No. 25.U.5849/30, a true and correct copy of which is included within the foregoing documents, and that this judgment has become and now is final. The Supreme Court in its decision of February 3, 1933 has rejected the re-

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

vision filed against this judgment, file No. VII. 324/1932. A true and correct copy of this judgment is included within the foregoing documents.

I certify to the correctness of this document by my signature and the attached seal of the Superior Court Berlin.

[Seal Superior Court Berlin]

Berlin, November 27, 1939.

SCHIRN

Inspector of Justice

as Keeper of the Record of the Clerk's Office of the Superior Court.

I, the undersigned, do hereby certify that I am, at the date hereof, the Chief Judge of the Superior Court Berlin. That at the date hereof, the 29th day of November 1939, Inspector of Justice Schirn is an official in the Clerk's Office of the aforesaid Superior Court Berlin and the legal keeper of the official records of the aforesaid Superior Court, that his signature to the foregoing certificate is genuine, that the seal of the Superior Court attached thereto is genuine and that he is the proper person to make the foregoing certification, that the attestation is in due form and that the same is in accordance with the laws of the land.

(Testimony of H. A. Gebhardt.)

Plaintiff's Exhibit No. 2—(Continued)

I certify to the correctness of this document by my signature and the attached seal of the Superior Court Berlin.

Berlin, November 29, 1939.

[Seal Superior Court Berlin]

(Signed) SCHNITZER

The Chief Judge of the Superior Court

[Seal Superior Court Berlin.]

Cost Bill.

Q. By Mr. Blum: The judgment of the Kammergericht also is in that file? A. Yes, sir.

Q. What kind of a court is that?

Mr. Blum: Will you stipulate that is a court of general jurisdiction, having jurisdiction of this appeal?

Mr. Selvin: I think I already have; that there were such courts, and the courts which purported to render these judgments in fact existed and had jurisdiction of the subject matter.

M. Blum: Very well.

Mr. Selvin: That includes the Reichsgericht as well as the Kammergericht.

Q. By Mr. Blum: Dr. Gebhardt, have you a photostatic copy of another action?

A. I have.

(Testimony of H. A. Gebhardt.)

Q. And what is that?

A. A complaint——

Q. Just identify it and then I will show it to Mr. Selvin.

A. It is a suit brought by the firm of Bank for Foreign Commerce, a corporation at Berlin, against May Film Corporation in liquidation, also at Berlin. The complaint is dated March 30, 1934, and the filing stamp shows June 11, 1934, received by the court in Berlin. [20]

Q. Have you made a translation of that document? A. I have.

Q. Do you have a copy of it? A. I have.

Mr. Selvin: I will ask leave to ask one or two questions on voir dire when this judgment, which is now shown, is offered.

The Court: All right.

Mr. Blum: In order to show the court the purpose of this particular action, this appears to be an action between the Bank for Foreign Commerce and the May Film Corporation, by and through its liquidator. It appears that a dispute arose between the May Film Corporation and the Bank for Foreign Commerce as to the ownership of the judgment, which became final in Exhibit 1, the subject of this action. And in that action, after a due hearing upon the matter, the German court determined that the ownership of the judgment in question was in Joe May, individually, and not in the plaintiff

(Testimony of H. A. Gebhardt.)

corporation, and that the assignment from Joe May to the Bank for Foreign Commerce was valid. It is a necessary adjunct to our chain of title and it is a judgment in rem adjudicating the ownership and the validity of an assignment.

Mr. Selvin: Is it offered now?

The Court: Are you offering it now?

Mr. Blum: We offer it. [21]

Mr. Selvin: May I ask a question on voir dire?

The Court: Yes.

Q. By Mr. Selvin: Dr. Gebhardt, you have before you, I take it, what are the pleadings and the judgment in that action between the Bank for Foreign Commerce and the May Film Corporation?

A. That is right.

Q. Does that record show that Universal Pictures Corporation was a party to that action? In fact, it does not show that Universal Pictures Corporation was a party, does it? A. No.

Q. And it does not show that Universal Pictures Company, Inc., was a party to that action, does it? A. No.

Mr. Selvin: We object to the offer on the ground that no foundation has been laid to show that it is in any way binding upon the defendant, on the ground that it is res inter alios acta, upon the ground that it is a direct impeachment of one of the findings in the very judgment that the plaintiff relies upon and seeks to enforce here. Your

(Testimony of H. A. Gebhardt.)

Honor will see, upon examination of that judgment, that Joe May was not in fact the owner of the claim sued upon, but that May Film Corporation was the owner. One of the issues there was whether or not Joe May or May Film Corporation owned the claim. [22]

The Court: I think, Mr. Selvin, that the question you are raising, both as to the effect of a judgment which decides not only the ownership of a claim subsequent to the rendition of the judgment, but actually decides the ownership of a claim while in process of adjudication, is whether we are dealing here with an assignment of an ordinary claim after it has been reduced to judgment, or to the assignment while the judgment was being fought through various courts, which raises a legal issue which can only be determined after all the facts in the case are before the court. [25]

Nevertheless, I am inclined to think it should go [26] in at the present time in the determination of these questions, and the question of law should be left to a later date. And by ruling on it you are, of course, not waiving any rights. I am not jeopardizing any of your rights.

Mr. Selvin: May I add another objection? That is, that a judgment of a foreign court cannot be enforced, even under the doctrine of comity, against a party who was not given an opportunity to be heard and defend in an action in which the foreign

(Testimony of H. A. Gebhardt.)

judgment was rendered. That is the situation in this case. [27]

The Court: With these observations, gentlemen, I will overrule the objections and the document entitled "Gerichtsabschrift", dated May 30, 1934, together with the translation, will be received as Plaintiffs' Exhibits 3 and 4. The original will be Exhibit 3, and the translation will be Exhibit 4. [30]

(Testimony of H. A. Gebhardt.)

PLAINTIFFS' EXHIBIT No. 4

Dr. Walter Schmidt
Dr. Wilhelm Beutner
Attorneys at the District Court
of Appeal and Notaries

Dr. Friedrich Kempner
Dr. Heinz Pinner
Dr. Joachim Beutner
Attorneys of Superior Court and Notaries

Berlin W8
Markgrafen Street 46
Telephone Number A2
Flora 7541

COURT COPY

Berlin, May 30, 1934

Letter Box of Superior Court
and Municipal Building
June 11, 1934, 15 to 17

Single Judge Case

To the Superior Court, Berlin, Department for Commercial Matters, Berlin C.2 Gruner Street.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Complaint of the firm of Bank for Foreign Commerce, a stock corporation at Berlin, Markgrafen Street 41, represented by its directors,

Plaintiff

Counsel: Attorneys Drs. Friedrich Kempner, Heinz Pinner, Joachim Beutner, Berlin W.8, Markgrafen Street, 46,

vs.

Mayfilm Corporation in Liquidation, In Berlin Culmacher Street 3, represented by its Liquidator, Kurt Hausdorff,

Defendant,

For Declaratory Relief.

Hearing July 23, 1934, 10 A. M. Court House, Gruner Street, Second Story, Second Floor, Room Number 19. Berlin, June 28, 1934. Superior Court, Department of Commercial Matters.

The President

[Signature Illegible]

As representatives of the plaintiff, we summon the defendant to an oral hearing in the case before the Superior Court, Berlin, Department of Commercial Matters, at a time to be set by the presiding Judge with the demand that it be represented at said hearing by an attorney admitted to the Superior Court, Berlin, and to advise any objections and evidence contrary to the allegations of the complaint

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

in writing to the court and to the counsel of the plaintiff.

We shall move:

1.) To declare that the claim asserted in the case of Mayfilm Corporation versus Universal 74.O.591.26, of Superior Court, 1, Berlin, in the amount of 50,000 R. M. with interest is for property of Joe May and not of the Mayfilm Corporation in liquidation, and that therefore the assignment made by May to the plaintiff is legally valid.

2.) To assess the cost of the suit to defendant.

3.) To issue temporary execution, if necessary upon giving security.

Reasons:

The defendant got into liquidation in February 1932. First Attorney Doctor Alexander Meier, Berlin, Friedrich Street, 225, was appointed liquidator. After his recall in December 1932, the business man, Kurt Hausdorff mentioned in the rubrum of the complaint was appointed.

Evidence:

The files of Registry of the Municipal Court, Berlin, reference to which is hereby requested.

In the year 1926, the defendant filed suit against Universal Pictures Corporation, New York, in the files 74.0.590/26 of the Superior Court I Berlin, for the payment of 50,000 R. M. with interest and costs. By judgment of the District Court of Appeal

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of July 29, 1932, Universal was ordered to pay the the amount demanded; Revision was rejected by judgment of the Supreme Court of February 7, 1933.

The liquidator and some creditors of the defendant take the position that this claim belongs to the assets of the corporation and should therefore be distributed pro rata among the creditors with the rest of the liquidation assets. This is not correct, as it is a claim of a former member of the board of directors of the defendant, film director Joe May.

In the year 1930, the business of the defendant was almost at a standstill. The nominal capital was at the time 200,000 R. M. In order to start production again, the then only shareholder of the defendant Joe May and the business man Julius Aussenberg, entered into an agreement that the capital stock be reduced to one-half and that Aussenberg simultaneously should purchase from Joe May 50,000 R. M. shares of stock at a purchase price of 45,000 R. M. At the same time it was agreed that Joe May should acquire with these 45,000 R. M. the assets of the defendant which were not necessary to start film production again.

In order to prove this agreement, it was incorporated in paragraph 3 of the association agreement of August 29, 1930, as follows:

"According to the last balance of June 30, 1930, Mayfilm has no debts outside of the cap-

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

ital stock and 8751.44 R. M. debts to the bank and assets of 113,755.54 R. M. Of these assets a portion with a value of 60,004.10 R. M. serve the purpose of new production. The other assets consist in the interests of the Mayfilm G.m.b.H. Filmstadt Woltersdorf Grundstuecks G.m.b.H. doubtful claims, manuscripts, etc. It has been determined by an intermediate balance of August 15, 1930, which of the assets were purchased and are of importance for new production. Those assets remain to the Mayfilm. The other assets are acquired from Mayfilm by by May upon payment of 45,000 R. M. (forty five thousand Reichsmark). The Mayfilm therefore had assets of 105,004.10 R. M. namely, 45,000 R. M. cash, and 60,00*0*.10 R. M. purchases for new production.

The trial balance of August 15th is to be made accordingly and at the same time shall be considered the opening balance of Mayfilm which is again actively working."

This agreement was then executed. Joe May paid 45,000 R. M. to defendant and then received as consideration from the then director of the defendant, Miss Johanna Loewenstein, the assets not necessary for new production. This settlement was confirmed by the defendant at the time, also by reason of the fact that Miss Johanna Loewenstein as director

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of the defendant, signed the balance of June 30, 1930, which did not contain the assets transferred to Joe May, after submitting it to the special meeting of August 28, 1930.

Evidence:

Intermediary balance of August 15, 1930, deposited in the Clerk's Office.

Among the assets which were not necessary for new production, was the above mentioned claim against Universal. There is involved the enforcement of a contractual penalty incurred in the year 1926. This claim then was assigned to Joe May.

Evidence:

Testimony of Johanna Loewenstein, at present at 1760 Courtney Avenue, Hollywood, California.

At the time of the agreement with Aussenberg, the chances of the law suit against Universal were very uncertain, inasmuch as the law suit had been lost by the defendants in the first instance. The value of this claim, was therefore considered not very high, so for this reason also, there were no objections to assign this claim to Joe May. Since then, Joe May personally paid all the costs of the law suit.

Evidence:

Testimony of the former attorney, Dr. Dientag, Amsterdam, Chopin Street 27, with Kolbe, Johanna Loewenstein, the vouchers and receipts in the court file of Superior Court 1 in Berlin, 74.0.590/26. All

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

parties interested were in complete accord that May should be the owner of this claim. Technically, in the interests of the procedure, the defendant was to carry on the law suit.

Evidence:

Testimony of the business man, Julius Aussenberg, Prag. 11, Hotel Alcron, Stepanska ul. 38.

As further evidence for the premises, I refer to the court file of Superior Court 1 Berlin, 221.Q.197.32, in which, upon motion of Joe May, without oral hearing, a restraining order was granted against the defendant, which restrained it from asserting that the claim against Universal belonged to it. It is requested that these court files be adduced and that the evidence produced therein be considered a part of this complaint.

Joe May assigned to plaintiff this claim against Universal in the sum of 50,000 R. M. on May 30, 1932.

Evidence:

Copy of assignment of May 30, 1932, is deposited in the Clerk's office. The foregoing complaint is necessary for the reason that the defendant, represented by its liquidator, refuses to admit that the claim against Universal does not belong to defendant, but to Joe May personally.

Copy filed.

(Signed) DR. PINNER
Attorney

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

(Copy)

Exhibit to Agreement of August 29, 30.

Balance per 8/15, 1930

Capital Stock		45,000.—	
Assets			Liabilities
Bank Balance:			
Production 1930/31			
Manuscript Film I	13,500.—		
" " II	5,500.—		
Music Film I	1,795.60		
Advances Film I	4,754.10		
" " II	5,282.06		
Salaries and wages	5,921.—		
General Expenses	8,250.34		
Organization and trips (Paris, London and United States)	15,000.—	60,004.10	
Loss Saldo, July 1, 1930		94,995.90	
		200,000.—	200,000.—

ASSIGNMENT

In the Court files of the Superior Court 1 Berlin 74.O.590/26, Mayfilm Corporation, Berlin makes a claim against the Universal Pictures Corporation, New York, in the amount of 50,000 R. M. (fifty thousand Reichsmark) under reservation of further claims. Mayfilm Corporation lost the case in the first instance. Appeal against this judgment was filed. The appeal is pending at the present time in

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the District Court of Appeal, file Number 25.U. 5849/30. The claim of Mayfilm Corporation against Universal Pictures Corporation was reserved to me personally in the partnership agreement between myself and Director Julius Aussenberg of August 24, 1930. This fact was expressly recognized by the Committee of creditors of Mayfilm Corporation in the negotiations with it.

With these premises, I hereby assign to the Bank for Foreign Commerce, a corporation at Berlin W. 56 Markgrafen Street, 41 ab, the claim involved in this lawsuit against Universal Pictures Corporation in the amount of R. M. 50,000 (fifty thousand Reichsmark) with interest in the amount to be allowed in the judgment and reservation of further claims.

Berlin, May 30, 1932

(Signed) JOE MAY

Dr. Walter Schmidt
Dr. Wilhelm Beutner
Attorneys at the District
Court of Appeals and Notaries

Dr. Friedrich Kempner
Dr. Heinz Pinner
Dr. Joachim Beutner
Attorneys of Superior Court
and Notaries

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Berlin W8
Markgrafen Street 46
Telephone Number A2
Flora 7541

(Court Copy)

Berlin, July 31, 1934

In the matter of Bank for Foreign
Commerce, a Corporation,

vs.

Mayfilm Corporation, in liquidation.
405.O.113/1934

We hereby correct the title of the case in this, that the liquidator of defendant, the business man, Kurt Hausdorff is residing at Barcelona, Spain, Calle de Avino 17.

We summon the defendant before the Superior Court, Berlin, Department 5, for commercial matters, to a hearing to be set by the court with the demand to appoint an attorney admitted to this court as its representative and to advise in writing as to any objections with offer of proof.

Copy is deposited.

The Attorneys
Dr. Friedrich Kempner,
Dr. Heinz Pinner and
Dr. Joachim Beutner

By DR. HEINZ PINNER.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

To the Superior Court, Berlin,
Department 5, for Commercial
Matters.

Dr. Friedrich Kempner
Dr. Heinz Pinner
Dr. Joachim Beutner
Attorneys of Superior Court
and Notaries

Berlin W8
Markgrafen Street 46
Telephone Number A2
Flora 7541

(Court Copy)

Berlin, August 27, 1934

In the Matter of Bank for
Foreign Commerce, a corporation

versus

Mayfilm Corporation, in
liquidation.

405.O.113.1934

A typographical error in the complaint is corrected in this that on page 3, line 16, on the bottom, it should read, Mayfilm G.m.b.H. instead of Mayfilm Corporation.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Copy of this pleading has been deposited with the Clerk's office.

The Attorneys,
DR. FRIEDRICH KEMPNER,
DR. HEINZ PINNER and
DR. JOACHIM BEUTNER.
Per DR. HEINZ PINNER.

To the Superior Court, Berlin,
Department for Commercial Matters.

Dr. Jr. John A. Fagg,
Attorney.

Berlin W. September 26, 1934
Wittenberg Place 1
B4 Bavaria 1053

In the matter of Bank for Foreign
Commerce,

versus

Mayfilm G.m.b.H. in Liquidation
405.O.113/34

I represent the defendant. I shall move first to reject the complaint. Second, in case of an adverse judgment to allow defendant to deposit security.

It is denied that the claim against Universal belongs to Mr. Joe May personally. It belongs to the assets of Mayfilm G.m.b.H. in liquidation.

It is correct that a portion of the former assets

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of Mayfilm G.m.b.H. were assigned to Mr. Joe May. However, the claim in question was not included. As plaintiff states, the law suit against Universal was conducted even after liquidation and after the agreement regarding transfer of a portion of the assets by the defendant without any change. As plaintiff states, the agreement in question was dated August 29, 1930. The suit against Universal was decided by the District Court of Appeal in July 1932, and by the Supreme Court in February 1933. Reference to those court files is made. These files are not accessible to the present liquidator of the defendant. According to his information, these court files will show that the claim in question belongs to the defendant. It must be denied for lack of information and belief that an agreement was made between defendant and Mr. Joe May that the defendant should continue this suit only technically, while the parties agreed that the claim would not belong to Mr. Joe May. It must also be denied upon lack of information and belief that Mr. Joe May alone paid the cost of the lawsuit.

(Signed) FAGG,

Attorney.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Dr. Friedrich Kempner
Dr. Heinz Pinner
Dr. Joachim Beutner
Attorneys at the Superior Court
and Notaries

Berlin W 8
Markgrafen Street 46
Telephone Number A2
Flora 7541

(Court Copy)

Berlin, September 28, 1934

In the matter of Bank for
Foreign Commerce
versus
Mayfilm Corporation,
in liquidation.
405.O.113.1934

Very Urgent Hearing on October 1, 1934

The following reply is made to defendants' pleading of September 26, 1934:

I.

Attention is called to an error in typing in opponent's pleading. In the heading of his pleading, defendant is named, as Mayfilm G.m.b.H. in Liquidation, while in realty, not Mayfilm G.m.b.H. which is in existence, but not in liquidation is a defendant, but Mayfilm corporation in liquidation. In

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

order to avoid mistakes, it is requested that the typographical error in opponent's pleading be corrected.

II.

Defendant denies that assignor, May could legally assign to plaintiff the claim in question, because this claim did not belong to him. Regarding this denial, reference is made to the court files, 221.Q.197/32 of the former Superior Court 1 Berlin, to which reference was made in the complaint. In these files of restraining order in which the defendant was restrained from claiming that the claim against Universal belonged to defendant, evidence is contained which makes this plain denial of defendant legally immaterial. If defendant which did not make any objections to the restraining order now makes a statement which the restraining order forebade that the claim against Universal belongs to defendant and not to Mr. May and therefore denies the allegations, defendant would have to state in detail what evidence can be produced against the evidence submitted previously. If defendant is unwilling or unable to do so, the denial is immaterial and does not require taking any further testimony after the files regarding the restraining order have been filed by reference.

III.

As a matter of precaution, the following is stated: Plaintiff has offered proof in case defendant

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

should deny Mr. May's right to the assigned claim by filing intermediary balance of August 15, 1930, and referred to the testimony of the then director of the defendant, Miss Loewenstein. If the court should consider defendant's denial sufficient, or if this can substantiate its denial so that it be considered sufficient, evidence may be taken by taking the deposition of Miss Loewenstein.

Defendant wants to prove the lack of authority of Mr. May to the claim by the court files, Mayfilm Corporation versus Universal, particularly by the judgments rendered therein by the District Court of Appeal and the Supreme Court. In the conclusions of law of the Supreme Court Judgment, the question of the right of the then plaintiff, Mayfilm Corporation, to the claim was not mentioned at all, because the then defendant, Universal, did not question before the Supreme Court plaintiff's authority to sue. As far as the District Court of Appeal Judgment is concerned, the portion of the judgment in point is hereby repeated literally in the interest of a speedy trial.

> "Plaintiff is entitled to sue upon the claim in question. The defendant, in order to prove that this is not the case, relies on the testimony of the witness Joe May according to which he as a stockholder, made an agreement with another stockholder, Aussenberg, regarding the corporation and agreed that among other assets of

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the corporation, the claim sued upon belong to him, while the law suit was to be conducted further by the corporation. May gave, according to his statement, a guarantee to the liquidation creditors in the amount of 40,000 R.M. He also states that he paid 45,000 R.M. On the other hand, he states that he would not be released from his guarantee even if the result of the present law suit would be taken into the liquidation assets. From this testimony, it must be assumed that the claim was not really assigned so that it passed from the corporation to one of the associates, but that an agreement was made between the associates and after completion of the liquidation, the present assets should be turned over to May after liquidation is completed. It is supposed to have been expressly agreed that the corporation was to continue in conducting the law suit and accordingly the collection of the judgment. Plaintiff now is a corporation, represented by the liquidator. As far as he is concerned, a distribution of the assets of the corporation among the associates, before paying debts of the association, would be invalid because the associates are not authorized to distribute among themselves the assets without paying the debts of the association."

The above cited statements of the District Court of Appeal are based principally upon the testimony

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

of the witness, May. This testimony has undoubtedly been wrongfully interpreted by the District Court of Appeal. The question is immaterial, however, because naturally, the conclusions of the judgment of the District Court of Appeal did not become final, and that the Superior Court, which is now trying this case anew, has to examine the question of the right to the claim. Furthermore, while at present the question of who owns the claims has been stated to the Superior Court in the complaint in detail, all these facts were unknown to the District Court of Appeal. Neither in writing nor orally were they argued there, because the objections of plaintiff's right to the claim were mentioned only in the very last stages of the lawsuit, and were so superficially mentioned in the last oral hearing, that at least the former attorney of the former plaintiff, now the defendant, did not figure that statements as they were made later would be given in the judgment. The court files, 221.Q.197/32 of the former Superior Court Number 1, to which reference has been made repeatedly, show that the defendant did not consider the statements of the District Court of Appeal of any moment, but considered them as incorrect, since to this day the defendant, represented by its former Liquidator, Dr. Meyer, nor by its present Liquidator, has raised any objections. Defendant rightly assumed that these statements of the District Court of Appeal, which

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

were merely dicta, could not be used against the present plaintiff or Mr. May, because the factual conditions, upon which the statements of the District Court of Appeal are based, are not in existence.

The District Court of Appeal assumes that the agreements made with the defendant were those of a corporation liquidation, and that the corporation debts had to be paid first. As far as the first premise is concerned, the District Court of Appeal overlooks the fact that the Mayfilm Corporation was not in liquidation at the time when the agreement in question was made, to-wit, in the year 1930. At the time when the agreements between the stockholder, May and Aussenberg were made, and the directors of the corporation agreed that upon payment of 45,000 Marks a number of assets be assigned to the stockholder, May, the corporation was alive and nobody thought of its liquidation. That the business at the time was inactive has nothing to do with the question whether it was in liquidation. The very fact of the agreement between May-Aussenberg, proves that one considered re-opening the business and in fact, business was re-opened to a considerable degree.

In February 1932, the corporation agreed to liquidate and Dr. Meyer was appointed Liquidator in 1932. Defendant can not deny that. The correctness of these statements appears from the files of the

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Register, which have been requested by my pleading of February 22, 1934 to be present at the hearing. The law is clear that any corporation which is alive and not in liquidation can enter into business deals with its stockholders as well as third persons, and that it can sell assets for valuable consideration to them.

If the District Court of Appeal speaks of a distribution of the assets among stockholders, this is a mistake as to the actual facts. The distribution to stockholders takes place, if assets are turned over to stockholders, either without any consideration, or upon transfer of stock, not however, if sales take place upon cash payment. Furthermore, the logical conclusion of the opinion of the District Court of Appeal could never be that the assets do not belong to the stockholder, but the consequences could at most be the possibility of a claim against the officers of the corporation for violation of their duties.

The further consideration of the District Court of Appeal that it required the payments of the debts of the corporation is based upon a wrong factual assumption, to-wit: That there were debts. The debts of the defendant originated in the year 1932. In the year 1930, the defendant, whose business, as was mentioned before, was at a standstill, was a corporation which had nothing but assets. Reference is made in this connection to paragraph III of the agreement of August 29, 1930, which has been cited in the complaint. The statements of the

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

District Court of Appeal are wrong for the further reason that, even if defendant had been in liquidation at the time the agreement was made, the law is that a distribution of the assets among the stockholders before payment of the debts may be made with the consent of the creditors. (See Staub-Pinner, paragraph 301, Exp. 7). This applies more so if there aren't any creditors at all who could be damaged.

The foregoing shows that reference to the judgment of the District Court of Appeal avails nothing to the defendant, because the District Court of Appeal started in its conclusions from wrong premises by reason of lack of sufficient information of facts.

IV.

Finally, defendant denies the existence of the understanding that in spite of the assignment of the claim to Mr. May, defendant was to continue the lawsuit. Our opinion is that this allegation in the answer is not material to the decision of this case. Material is only to whom the claim actually belongs; it is of very little importance if somebody else was allowed to enforce the claim.

For the correctness of our statements, testimony of Mr. Aussenberg is offered.

V.

For the information of the court, it may be mentioned that as has been stated before, defendant

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

never denied Mr. May's right to the claim. If defendant does so now, the reason for this is the attitude of the creditors or the committee of creditors. In a meeting in January 1932, they admitted to the attorney of defendant, Dr. Dienstag, that the claim belongs to Mr. May.

Evidence:

Testimony of Dr. Dienstag:

When the creditors committee in August 1932, heard of the casual remark of the District Court of Appeal cited above, he declared that the statements formerly made by him were not binding and that he adopted the opinion of the District Court of Appeal which was evidently based on false factual premises. This was the reason why the Liquidator of the defendant now also denies the claim.

Evidence as above.

(Signed) DR. PINNER,
Attorney.

Superior Court Berlin. February 25, 1935

It is requested to give the following number in all communications.

No. 405.O.113.34

This judgment has become final. 4/10/35.

Koch, Inspector of Justice.

In the name of the German People!

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Rendered: February 25, 1935.

(Signed) KIEFER, J.A.,

Court employee as recorder of the Court.

In the case of the firm of Bank for Foreign Commerce a stock Corporation at Berlin W.8, Markgrafen Street 41, represented by its directors, Plaintiff.

Counsel: Attorneys Dr's Friedrich Kempner, Heinz Pinner, Joachim Beutner, Berlin W. 8, Markgrafen Street 46,

versus

Mayfilm Corporation in liquidation at Berlin, Kurfuerstendamm 108/109 with drescher, represented by its liquidator, Kurt Hausdorff at present at Barcelona (Spain), Defendant.

Counsel: Attorney Dr. John A. Fagg, Berlin, Wittenberg Place 1.

The 5th Department for commercial matters of the Superior Court Berlin after trial on February 11, 1935 by Superior Court director Ronneberg and commercial judges Lettner and Biermann has adjudged:

I. It is hereby decided that the claim asserted in the case of Mayfilm Corporation versus Universal—74.O.591.26 of Superior Court I

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Berlin in the amount of 50,000.00 R.M. with interest is the property of Mr. Joe May personally and not of the Mayfilm Corporation in liquidation and that therefore the assignment made by May to the plaintiff is legally valid.

II. Costs of the suit are assessed to defendant.

Facts:

The defendant, Mayfilm Corporation in liquidation obtained in the files 74.O.591.26. against the Universal Pictures Corporation in New York, a judgment in the District Court of Appeal of July 29, 1932 for the payment of 50,000.00 R. M. with interest. Revision against this judgment was rejected by the Supreme Court.

The plaintiff filed suit against the defendant to declare that this claim belonged to its former director of the corporation, the film-director Joe May personally and that accordingly the assignment made by Joe May to the plaintiff Bank is valid. Plaintiff alleges: That on August 29, 1930 an agreement was made between the business man Julius Aussenberg and the then only stockholder of the defendant Joe May to the effect, that Aussenberg should acquire shares of stock of the Corporation of the nominal value of 50,000.00 R.M. for 45,000.00 R.M. and that Joe May should receive for these 45,000 R.M. the assets of the Corporation, which were not necessary for the beginning of new film

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

production. That is conformance with this stipulation, Miss Johanna Loewenstein as director of the defendant assigned the claim against Universal to Joe May. That this claim belonged to the assets which were to be transferred to Joe May.

The defendant prays:

Denial of the suit, if necessary the right to deposit security.

Defendant denies the allegations of the complaint according to its pleading of September 26, 1934.

For particulars of the allegations of the parties reference is made to the contents of their pleadings.

According to the order to take testimony of October 1, 1934 testimony has been taken regarding the allegations of the complaint. Johanna Loewenstein in Hollywood, California gave her deposition under oath before the notary, Karl L. Ratzer in Los Angeles, California, U. S. A., who was authorized by commission, on December 27, 1934. Reference is made to the minutes of the notary.

Grounds for Decision.

The witness testified at her deposition in Los Angeles as follows: It is correct that there was assigned to the Film Director, John (Joe) May, in conformance with the agreement with the business man, Julius Aussenberg and the intermediary bal-

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

ance of the defendant of August 15, 1930, in consideration of the payment of 45,000.00 Reichsmark, the claim against Universal Pictures Corporation, New York, in the amount of 50,000.00 Reichsmark. Messrs. Joe May and Julius Aussenberg entered into the partnership agreement which was signed at the annual meeting of the Mayfilm Corporation on August 29, 1930. In this partnership agreement it was stipulated that all the old assets of the Mayfilm Corporation, which did not refer to new production, would be assigned to Mr. Joe May upon payment of 45,000.00 Reichsmark. I remember that among these assets the claim against Universal Pictures Corporation for payment of 50,000.00 Reichsmark contractual penalty was included. At that time, the lawsuit had been lost in the Lower Court, therefore one did not estimate the value of this claim very high and as director of the Corporation, I had no objection to signing the intermediary balance of August 15, 1930. Therefore I also agreed to the contents of the partnership agreement between May and Aussenberg.

According to this intermediate balance, Joe May paid to Mayfilm Corporation 45,000.00 Reichsmark and was assigned to him in consideration the assets, including the lawsuit against Universal Pictures Corporation. Only as a matter of form the lawsuit was continued in the name of the Mayfilm Corporation. In spite of the fact that the lawsuit

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

was continued under the old title, the claim belonged to Joe May, who, from this time on had to bear the costs and give the information regarding the appeal and the later revision to the Supreme Court.

I know these facts, for the reason that after August 29, 1930 I had charge of the finances of the Mayfilm Corporation and I know that no expenses were paid for the lawsuit after August 29, 1930 until the liquidation of the Mayfilm Corporation. Joe May continued the lawsuit alone, from August 29, 1930 on.

Proof for the allegation of the complaint has been made by this testimony, so that according to paragraph 256 of the Code of Civil Procedure the prayer for declaratory relief must be granted.

According to paragraph 91 of the Code of Civil Procedure defendant is ordered to pay the costs of suit. Judgment is given accordingly.

(Signed): RONNEBERG
LETTNER
BIERMANN

405.O.113/34 October 9, 1934

ORDER TO TAKE TESTIMONY

Testimony is to be taken regarding plaintiff's allegation.

I. That there was assigned to the film Director, Joe May, in conformance with the agreement with the business man, Julius Aussenberg, and the in-

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

termediary balance of the defendant of August 15, 1930 in consideration of the payment of 45,000 R.M. the claim against Universal Pictures Corporation, New York, in the amount of 50,000 R. M., and that the lawsuit regarding this claim against Universal was only continued in the name of defendant, but that from the time of the assignment, it was financed and conducted by May, by taking the deposition of Johanna Leowenstein at Hollywood, California, United States of America, 1760 Courtney Avenue, named as witness by the plaintiff.

II. That the German Counsul at Hollywood, shall be requested to have the deposition taken.

III. Taking of the deposition shall be dependent upon payment of an advance of costs by the plaintiff in the amount of 50 R.M. and of an advance for the expenses caused by the air mail.

V. The date for continuance of the oral hearing is reserved.

Berlin, October 1, 1934.

Superior Court, Department 5, For Commercial Matters.

(Signed) RONNEBERG and BIERMAN

The Superior Court
Department 5 for Commercial Matters.
File Number 405.O.113/34
(This number must be mentioned with
all documents.)

1 enclosure.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Berlin C. 2, November 8, 1934
Neue Friedrich Street 15-16

In the Name of the German People!

The Superior Court, Berlin, to
Mr. Karl L. Ratzer, Notary at
Los Angeles, California:

You are hereby notified that the above-named court has appointed you commissioner and has authorized you by these presents:

To take the deposition of Miss Johanna Loewenstein, under oath, residing at Hollywood, California, 1760 Courtney Avenue, within the State of California, in the lawsuit pending before the said Superior Court of firm of Bank for Foreign Commerce, a stock corporation, at Berlin, W 8, Markgrafen Street, 46, represented by its directors, plaintiff, counsel, attorneys, Drs. Friedrich Kempner, Heinz Pinner, Joachim Beutner, Berlin W 8, Markgrafen Street, 46, versus Mayfilm Corporation in liquidation, at Berlin, Kurfurstandamm 108/109 at Drescher, represented by its Liquidator, the business man, Kurt Hausdorff, defendant, counsel attorney, Dr. Jur. John A. Fagg, Berlin W, Wittenberg Place 1, as a witness, in conformance with the order to take testimony of October 6, 1934, pursuant to the following instructions. (See statement below), and to ask the following questions:

1. What is your name, first name, your age, occupation, residence?

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

2. Do you know the parties and since when? Are you related or related by marriage to one of its managers?

3. What do you know about the allegation of the plaintiff that there was assigned to the Film Director, Joe May, in conformance with the agreement with the business man, Julius Aussenberg, and the intermediary balance of the defendant of August 15, 1930, in consideration of the payment of 45,000 R. M. the claim against Universal Pictures Corporation, New York, in the amount of 50,000 R. M. and that the lawsuit regarding this claim against Universal was only continued in the name of defendant, but that from the time of the assignment, it was financed and conducted by May.

4. Do you know anything else regarding the questions in this lawsuit which you have not said as yet? Please make complete statement.

According to German law, the parties and their legally authorized representatives have the right to be present at the deposition of the witness.

It is requested to advise the date of the hearing in time so that the parties may be notified from here.

For a better understanding of the questions, the following statement is made:

The defendant entered into liquidation in

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

February 1932. In the year 1926, defendant filed a suit in the court files 74.O.590/26, of the Superior Court 1 Berlin, against Universal Pictures Corporation, New York, for the payment of 50,000 R. M. with interest and costs. (See order to take testimony 1); by judgment of the District Court of Appeal of July 28, 1932, Universal was ordered to pay the amount claimed; its revision was rejected by judgment of the Supreme Court of February 3, 1933. Plaintiff alleges that this claim did not belong to the liquidation assets, but belonged to the Film Director, Joe May, and was assigned to plaintiff. Plaintiff filed a suit for declaratory relief to this effect against the defendant. Copy of affidavit of the witness, Johanna Loewenstein of December 3, 1932, which was filed in the matter of restraining order, May vs. Mayfilm Corporation, 221.Q.197.32, Superior Court, 1, Berlin, is attached hereto.

The Presiding Judge Ronneberg,
Director of the Superior Court.
Seal of the Prussian Superior Court,
Berlin.

Transcript at Los Angeles, California, United States of America, in the office of the Attorneys, Ratzer, Bridge & Gebhardt, before the Notary Karl L. Ratzer, on December 27, 1934; clerk, Marta Schacht.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

In the matter of the firm "Bank for Foreign Commerce Corporation at Berlin," plaintiff, vs. "Mayfilm Corporation" in Liquidation at Berlin, there appeared before the undersigned Notary, appointed by Commerce of the Superior Court, Berlin, Department 5, for Commercial Matters of November 8, 1934, as a witness, Miss Johanna Loewenstein.

According to cable of the above named Superior Court, Berlin, to the German Consulate at Los Angeles, California, the parties waive notice of hearing and agree to the taking of the deposition of the witness on the present day.

The witness was advised as to the meaning of the oath and the consequences of perjury, and was advised that the oath also related to the answer to the general questions.

Thereupon, the witness was asked the following questions, to which she replied as follow*ed*:

1st. What is your name, first name, your age, occupation, residence?

Answer: Loewenstein, Johanna; Secretary, 1760 Courtney *Aven,* Los Angeles, California.

2nd: Do you know the parties, and since when? Are you related or related by marriage to one of its managers?

Answer: I know the Mayfilm Corporation from its inception since about 1923; I know the bank for Foreign Commerce for a number of

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

years, to the best of my recollection, about six or seven years. I am neither related, nor related by marriage to the managers of either party.

3rd: What do you know about the allegation of the plaintiff that there was assigned to the Film Director, Joe May, in conformance with the agreement with the business man, Julius Aussenberg, and the intermediary balance of the defendant of August 15, 1930, in consideration of the payment of 45,000 Reichsmark, the claim against Universal Pictures, New York, in the amount of 50,000 Reichsmark, and that the lawsuit regarding this claim against Universal was only continued in the name of defendant, but that from the time of the assignment, it was financed and conducted by May?

Answer: It is correct, that there was assigned to the Film Director, John (Joe) May, in conformance with the agreement with the business man, Julius Aussenberg, and the intermediary balance of the defendant of August 15, 1930, in consideration of the payment of 45,000 Reichsmark, the claim against Universal Pictures Corporation, New York, in the amount of 50,000 Reichsmark.

Messrs. Joe May and Julius Aussenberg entered into a partnership agreement which was signed at the annual meeting of the Mayfilm Corporation of August 29, 1930. In this partnership agreement, it was stipulated that all

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the old assets of the Mayfilm Corporation which did not refer to new production, would be assigned to Mr. Joe May upon payment of 45,000 Reichsmark. I remember that among these assets the claim against Universal Pictures Corporation for payment of 50,000 Reichsmark contractual penalty was included. At that time, the lawsuit had been lost in the Lower Court. Therefore, one did not estimate the value of this claim very high and as director of the corporation, I had no objections to signing the intermediary balance of August 15, 1930. Therefore, I also agreed to the contents of the partnership agreement between May and Aussenberg.

According to this intermediate balance, Joe May paid to Mayfilm Corporation, 45,000 Reichsmark, and was assigned to him in consideration the assets, including the lawsuit against Universal Pictures Corporation. Only as a matter of form, the lawsuit was continued in the name of the Mayfilm Corporation. In spite of the fact that the lawsuit was continued under the old title, the claim belonged to Joe May, who, from this time on had to bear the costs and give the information regarding the appeal and the later revision to the Supreme Court.

I know these facts for the reason that after

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

August 29, 1930, I had charge of the finances of Mayfilm Corporation and I know that no expenses were paid for the lawsuit after August 29, 1930, until the liquidation of the Mayfilm Corporation.

Joe May continued the lawsuit alone, from August 29, 1930 on.

4. Do you know anything else regarding the questions in this lawsuit which you have not said as yet?

Answer: I had nothing to do with the liquidation of the Mayfilm Corporation.

The foregoing transcribed statements were read to the witness, approved by her and signed as follows:

JOHANNA LOEWENSTEIN

The witness was sworn, the undersigned Notary speaking the following form of oath:

"You swear by God the Almighty and Omniscient, that to the best of your knowledge you have spoken the pure truth and not withheld anything."

Whereupon, the witness, raising her right hand, spoke the words:

"I swear it so, help me God."

(Signed) KARL L. RATZER,
Notary.
MARTA SCHACHT,
Clerk.

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

Number 9: Seen at the German Consulate for the acknowledgment of the above signature of the Notary for the District, Los Angeles, California.

KARL L. RATZER,

Los Angeles, January 3, 1935,

The German Counsul,

Per R.A.H.

Seal of the German Consulate, Los Angeles, California.

[Endorsed]: Filed Sept. 24, 1940.

The correctness of the foregoing photostates with the documents and writings contained in the Court files is hereby acknowledged.

Berlin, June 29, 1939

(Seal of the Superior Court Berlin.)

SCHIRN

Inspector of Justice and as keeper of the records of the office of the Superior Court.

(The entire document has been sewn with thread and closed with the seal of the Superior Court.)

I the undersigned do hereby certify that I am at the date hereof an official in the clerks office of Department 100 of the Superior Court Berlin and am the legal keeper of the official records of the aforesaid Superior Court, that I have compared the foregoing photostatic copy with the original

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

records and documents in that certain action entitled firm of Bank for Foreign Commerce Corporation at Berlin W.8. Markgrafen Street 41

versus

Mayfilm Corporation in liquidation at Berlin, file No. 405.O.113.34, on file in this Court, and now in my possession, and that the same are, and each of them is, true and correct copies of the original of what they purport to be. That the judgment of the Superior Court Berlin dated February 25, 1935 in the above entitled matter has become and now is a final judgment.

I hereby certify to the correctness of this document by my hand and the attached seal of the Superior Court Berlin.

Berlin, November 27, 1939.

(Seal of the Superior Court Berlin.)

SCHIRN

Inspector of Justice as record keeper of Department 100, Clerk's office of the Superior Court.

I, the undersigned, do hereby certify that I am at the date hereof the Chief Judge of the Superior Court Berlin. That at the date hereof, November 29, 1939, Inspector of Justice Schirn is an official in the Clerk's office of the aforesaid Superior Court Berlin and the legal keeper of

(Testimony of H. A. Gebhardt.)

Plaintiffs' Exhibit No. 4 (Continued)

the official records of the aforesaid Superior Court, that his signature to the foregoing certificate is genuine and that the seal of the Superior Court attached thereto is also genuine, and that he is a proper person to make the foregoing certification and that the attestation is in due form and that the same is in accordance with the laws of the land.

I certify to the correctness of this document by my signature and the affixt, official seal of the Superior Court Berlin.

Berlin, November 29, 1939.

The President of the Superior Court

SCHNITZER

(Seal of the President of the Superior Court at Berlin.)

Gen. 9101 D 3421/2 50.00 R.M. fee for acknowledgment paid.

Berlin, November 29, 1939.

Office of Superior Court Clerk's office.

Signature illegible

Inspector of Justice.

Q. By Mr. Blum: Dr. Gebhardt, I show you a document upon the stationery of the Bank fur Auswartigen Handel, [31] which is the Bank for Foreign Commerce. A. That is correct.

Q. That is written in German? A. It is.

(Testimony of H. A. Gebhardt.)

Q. And is this the English translation of it?

A. I will have to check that for a minute.

Q. Here is your translation. Do you want to compare it with yours?

A. That appears to be a translation.

Q. Yes. And this letter of Ratzer, Bridge & Gebhardt, that refers to your firm?

A. Ratzer, Bridge & Gebhardt was the firm of which I was a member until about a year ago, and I was a member of that firm on February 25, 1936.

Q. That is Mr. Ratzer's signature?

A. That is Mr. Ratzer's signature.

Mr. Blum: Will you stipulate that this letter was received by Universal, Mr. Selvin, together with these enclosures?

Mr. Selvin: Yes.

Mr. Blum: We offer this in evidence as Plaintiffs' exhibit next in order.

Mr. Selvin: Is it offered for any other purpose than to show what notice was given Universal? If it is offered to prove the truth of any of the facts recited in the letter, then we object to it on the ground that it is self-serving. [32]

Mr. Hirschfeld: It is offered for whatever legal effect it may have.

Mr. Selvin: Then we object to it upon the ground that it is self-serving and a recital of past events, and not the best evidence, nor any evidence of the facts which the letter recites have

(Testimony of H. A. Gebhardt.)

occurred. That contains a statement of what is supposed to have happened and what their legal effect was, and matters of that sort.

Mr. Blum: As a further foundation, perhaps I should ask this: Have you ever seen the document in German before? A. I have.

Q. Was that received by your office, your firm?

A. It was.

Q. And from whom was it received?

Mr. Selvin: I will object to that on the ground that that calls for hearsay. [33]

The Court: It is evident that this letter, dated February 12, 1936, from the Bank fuer Auswaertigen Handel, and the translation, the letter of transmittal, can be received only as evidence of the fact that certain notice was given of certain claims, but they cannot be received as proof of title in the Bank by reason of the recital therein. They indicate merely that on that date the Bank claimed to be the owner of the claim by virtue of subrogation. With that limitation the document consisting of the German letter dated February 12, 1936, the translation attached, certified to by Mr. Ratzer, and the letter of transmittal from the firm of Ratzer, Bridge & Gebhardt will be received as one exhibit.

(Testimony of H. A. Gebhardt.)

am the legal owner of said claim and judgment. My title regarding this claim is based upon a contract entered into between myself and Julius Aussenberg, merchant, dated August 29th 1930 pursuant to which together with other properties of Mayfilm A.G. (Corporation) this claim against the Universal Pictures Corporation was assigned to me.

With these premises I hereby transfer and assign to the Bank fuer Auswaertigen Handel Aktiengesellschaft (Corporation) Berlin S.W. Markgrafenstrasse 41 the above mentioned claim and judgment together with interest and all other rights to its fullest extent.

Berlin,
February 9th 1933
(Signed) JOE MAY"

As further security for the above mentioned claim against the Mayfilm Fritz Mandl, General Manager, residing at Hirtenberg in Lower Austria (Austria) is guarantor.

We have held General Manager Fritz Mandl responsible under said guarantee and he has satisfied in full our claims against Mayfilm A.G. (Corporation)

Based upon these facts according to the provisions of the German Laws (§ 774 Civil Code) the guarantor who has satisfied the claims against the principal debtor is subrogated to all the rights of the creditor together with all securities. Therefore the above mentioned General Manager Fritz Mandl

(Testimony of H. A. Gebhardt.)

in Hirtenberg is subrogated to the claim against you in the sum of R.M. 50.000.—together with interest of 2% above Discount of the Reichsbank beginning July 1st, 1926, which has been assigned to us, of which we hereby give you notice. You can only satisfy said debt by payment to the above mentioned (Fritz Mandl)

Very truly Yours
BANK FUER AUSWAERTIGEN HANDL
Aktiengesellschaft
(Corporation)
(Signed) DR. LENK SCHLESINGER

I hereby acknowledge the above signatures of:

1.) Dr. Erich Lenk, Member of the Board of Directors
2.) Kurt Schlesinger, Bank Manager

both of the Bank fuer Auswaertigen Handel A.G. (Corporation)
Berlin W.8. Markgrafenstrasse 40

Berlin, February 12th 1936
(Signed) WILHELM MANTHEY.
Notary in the District of the Prussian District Court of Appeal No. 66 Not. Reg. for 1936
[Seal of notary]

Cost bill
value 3000 RM.
Fee according to § 5 Fee Schedule for Notaries and §§ 32, 41, 51 Prussian Court Cost Law 6.40 RM
(Signed) MANTHEY
Notary

(Testimony of H. A. Gebhardt.)

Karl L. Ratzer, a notary public, in and for the County of Los Angeles, State of California, hereby certifies as follows: That he is familiar with the English and German languages; that he has translated from German into English the hereto attached letter from the Bank for Foreign Trade at Berlin, Germany, dated February 12, 1936 and addressed to the Universal Pictures Corporation, New York, U. S. A., and that the foregoing is a true and correct translation from German into English of said letter.

Dated: February 25, 1936

[Seal] KARL L. RATZER

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card. Universal Pictures. F. Lawler. Date of delivery 2/27/36.

Post Office Department. Official Business. Registered Article.

No. 222127. Insured Parcel.

No.....

Return to Ratzer, Bridge & Gebhardt.

Street and Number, or Post Office Box, 1101 Washington Building.

Los Angeles, California.

[Endorsed]: Filed Sept. 24, 1940.

(Testimony of H. A. Gebhardt.)

Mr. Blum: Is it received as a recital of the fact that the Bank had received payment of its claim?

The Court: No. It can't be received for that.

Mr. Blum: Is it received as the basis of showing that a claim was paid?

The Court: No. You can't receive a notice as basis of a fact. You can receive it only as being a claim that that fact existed. It is not evidence of either the claim or the assignment. It is evidence that somebody claims to have a claim.

Mr. Blum: I understand, your Honor, that that is not conclusive proof——

The Court: It isn't any proof. [34]

Mr. Blum: But what I am trying to find out, is that proof that Fritz Mandl received a claim?

The Court: Certainly not.

Mr. Hirschfeld: What we want, your Honor, is to interpret that as being an admission against interest contained in there of one additional fact; that is, "We acknowledge we have been paid."

The Court: Who? They are not before the court.

Mr. Hirschfeld: I don't understand.

The Court: I mean the Bank is not before the court.

Mr. Hirschfeld: But the Bank, in a letter to the debtor says, "Our claim is paid."

The Court: Yes; and, "You pay to the other man."

(Testimony of H. A. Gebhardt.)

Mr. Hirschfeld: "You pay to the other man."

The Court: That is an admission against interest. [35]

The Court: I will overrule the objection. I think we will discuss the effect after the chain of title is completed.

Q. By Mr. Blum: Dr. Gebhardt, that document refers to paragraph 774 of the Civil Code of Germany? A. That is right.

Q. Are you familiar with that paragraph?

A. I am.

Q. Of the Civil Code?

A. May I have the Civil Code in German there? There is also the English translation by Mr. Loery, which is also present in court. Paragraph 774 of the German Civil Code—shall I read it in German?

The Court: Unfortunately the reporter can't take it down. You translate it and I will look at it.

A. The section reads—the translation:

> "In so far as the guarantor satisfies a creditor the claim of the creditor against the principal debtor [38] is transferred to him."

That is the first sentence of the paragraph upon which you undoubtedly rely. Then it says:

> "The transfer cannot be claimed to the detriment of the creditor. Any objections of the main debtor, from a legal relation existing between him and the guarantor, are not affected."

The transfer of a claim is provided for in Section 412 of the German Civil Code. In other words,

(Testimony of H. A. Gebhardt.)

if I may explain this, this is a transfer, by operation of law——

The Court: Yes.

A. ——of a guarantor who pays the main indebtedness.

The Witness: By an operation of law. Section 412 of the Civil Code applies, which says, "The provisions of paragraphs 399 to 404, 406 to 410 of the Civil Code apply to the transfer of a claim by operation of law." And among this section 1, paragraph 401 of the German Civil Code, which reads as follows: "With the transfer of a claim the mortgages or liens"—you might say pledges—"which exist [39] are also transferred to the new creditor, as well as the rights originating from the guarantee." That is Section 401. If this translation is not clear I would be very glad to read from Loery's translation.

Mr. Selvin: We have it translated from Loery's translation.

The Witness: I didn't finish Section 401. "The assignee can also claim a right of precedence pertaining thereto in case of a levy of execution or in case of an insolvency."

Q. By Mr. Blum: If I understand that correctly it means that where a party becomes a guarantor of a certain obligation, and if the guarantor is called upon to pay off that obligation and does in fact pay off that obligation, that by the payment of the particular obligation in question, by opera-

(Testimony of H. A. Gebhardt.)

tion of law he becomes the assignee of the claim, as well as the owner of the security?

A. That is correct. By operation of law he is subrogated or transferred—the claim is transferred to him, as well as any existing mortgages, liens or pledges.

Q. In that document, which is Plaintiffs' Exhibit 5, the German translation thereof, will you read it on page 2 thereof?

A. The letter is signed by two signatures, and underneath the signatures, which are underneath the stamp of the Bank for Foreign Commerce, appear the following: "I hereby [40] acknowledge the above signatures of: First, Dr. Erich Lenk, member of the Board of Directors; second, Kurt Schlesinger, Bankprokuristen,"—which is a technical term, your Honor,—"both of the Bank for Foreign Commerce, a corporation, Berlin W. 8. Markgrafenstrasse 40. Berlin, February 12th, 1936. Signed, Wilhelm Manthey, Notary in the District of the Prussian——"

The Court: Attorney in fact, isn't it?

The Witness: Bankprokuristen is translated here as—the Commercial Code provides for a bankprokuristen, who is really the manager, and the Commercial Code provides that he is really representing the Bank to the outside.

Q. By Mr. Blum: That he is an agent of and authorized to execute documents?

(Testimony of H. A. Gebhardt.)

A. He is. He is the one that signs either letters or documents.

Q. That he is a duly authorized agent; is that what it means?

A. For the purposes of the business, yes.

Mr. Blum: May we have the Lenk deposition, Mr. Clerk?

(Discussion.)

Mr. Blum: In order to go on with Dr. Gebhardt we will have him identify certain documents which will have to be connected up with depositions.

The Court: Go ahead.

Mr. Blum: This is the assignment from Fritz Mandl to [41] the Union Bank, and the translation.

Mr. Selvin: As an assignment, I have no objection to it, but I object to it if it is offered to prove the truth of any of the recitals upon the ground that they are self-serving and not binding upon the defendant. They have the habit, in these things, to tell the whole history whenever they start to show an assignment.

The Court: They are no worse than our "whereases."

Mr. Selvin: I object to the document if it is offered for the truth of any of the recitals. As far as an assignment from Mandl to the Bank is concerned, I am willing to stipulate that if Mandl had anything he assigned it to the Union Bank, but I won't stipulate that he owned anything at the time he assigned it.

(Testimony of H. A. Gebhardt.)

Mr. Hirschfeld: That is all right.

The Court: I cannot single out any recital from the ultimate facts which are set forth. The assignment and the translation will be received as one exhibit.

Q. By Mr. Blum: Dr. Gebhardt, is that translation a correct translation of the German document?

A. I want to look at it. I believe I made it.

Mr. Blum: That will be No. 6, your Honor?

The Court: Exhibit No. 6.

Mr. Blum: The witness has not identified the translation, your Honor.

The Witness: I would like to look at it. I believe I [42] made the translation, but I haven't seen it for some time.

The Court: All right.

The Witness: Yes. That is the translation I made.

The Court: It may be received as Exhibit 6 in evidence.

PLAINTIFFS' EXHIBIT No. 6

ASSIGNMENT

1) The Bank for Foreign Commerce at Berlin, Markgrafenstr. 40 has granted to the Mayfilm Corporation in Liquidation at Berlin a credit of 100.000 Marks in September 1931, for which I, the undersigned Fritz Mandl became guarantor. As security for my guaranty I gave the Bank for Foreign Commerce a deposit in this amount.

(Testimony of H. A. Gebhardt.)

2) Universal Pictures Corporation New York has been ordered to pay the sum of 50.000 Marks with interest of 2% above the discount rate of the Reichsbank from July 1, 1926 by judgment of the District Court of Appeal Berlin July 27, 1932, No. 25 U 5849/30. The appeal from this judgement filed by Universal Pictures has been denied by judgment of the Supreme Court Leipzig of February 3, 1933.

3) In the case No. 405 O 113/34 of the Superior Court Berlin it was held that the claim of the Mayfilm Corporation mentioned under 2 belongs to Joe May, at present in Hollywood, 2020 Grace Avenue and has been legally assigned by him to the Bank for Foreign Commerce as security for the credit granted by it to the Mayfilm Corporation (see No. 1). The judgment 405 O 113/34 has become final, as is shown in the note on the judgment.

4) The Foreign exchange control office Berlin has authorized the Bank for Foreign Commerce in January 1936 to satisfy its claim out of the deposit made by myself as per No. 1. Therefore according to the German Law the claim of the Bank for Foreign Commerce against the Mayfilm Corporation together with all sureties given for this claim, including the claim against Universal has been transferred to me, Fritz Mandl.

With these premises, I, the undersigned Fritz Mandl hereby assign this claim to the Union Bank

(Testimony of H. A. Gebhardt.)

and Trust Company, 8th and Hill Streets, Los Angeles, California.

Vienna April 22, 1936.

[Signed] F. MANDL.

Austrian Revenue stamp.

G.Z. 488/36 U.

I hereby acknowledge the genuineness of the above signature of Mr. Fritz Mandl, Director General in Vienna IV Schwarzenbergplatz 15.

Vienna the 22nd day of April 1936.

[Signed] DR. JULIUS ULLMANN

Notary

[notarial seal]

[Endorsed]: Filed Sept. 24, 1940.

Mr. Blum: This is a power of attorney from Fritz Mandl to Ellis I. Hirschfeld and Dr. Gebhardt to represent him in a suit against Universal Pictures Corporation.

Mr. Selvin: I just took it for granted that if you filed the suit you were authorized to do it.

The Court: All right. It may be received for showing whatever it shows.

(Plaintiffs' Exhibit No. 7.)

(Testimony of H. A. Gebhardt.)

PLAINTIFFS' EXHIBIT No. 7

Power of attorney.

Austrian revenue stamps.

I hereby give power of attorney to the attorneys Ellis I. Hirschfeld, 629 South Hill Street, Los Angeles, California and Dr. Gebhardt of the firm of Ratzer Bridge & Gebhardt, Washington Building Los Angeles, California
to represent me in my suit against Universal Pictures Corporation, Los Angeles and to do all the necessary acts in court and out of court which are necessary to enforce the claim.

Monies collected are to be deposited in the Union Bank & Trust Co Los Angles in an account in my name.

Mr. Joe May, there, is authorized by me to give information.

Vienna April 22, 1936.

[Signed] F. MANDL

Austrian revenue stamp

G.Z. 487/36 U.

I acknowledge the genuineness of the above signature of Mr. Fritz Mandl, Director General in Vienna IV, Schwarzenberg Place 15.

Vienna, April 22, 1936.

Fee & Tax 10 Shillings.

[Endorsed]: Filed Sept. 24, 1940.

(Testimony of H. A. Gebhardt.)

Mr. Blum: This purports to be an assignment from the Union Bank and Trust Company to John Luhring and Margaret Morris, who are the principal palintiffs. And I understand, Mr. Selvin, you will stipulate that the signatures thereon are the signatures of officers of the Union Bank and Trust Company of Los Angeles.

Mr. Selvin: Yes, I will stipulate that they are signatures of officers of the Union Bank and that that is the seal of the Union Bank, and that the officers who made that had authority to do so.

Mr. Blum: We will accept that stipulation.

The Court: It may be received as Plaintiffs' Exhibit 8. [43]

PLAINTIFFS' EXHIBIT No. 8

Los Angeles, California
January 16th, 1937

For Value Received, we, the undersigned, hereby sell, transfer and assign to plaintiffs, John Luhring and Margaret Morris, those certain judgments of the German Court, hereinafter described:

(1) Judgment rendered March 4, 1930, in the Superior Court of Berlin, Germany, also known as the Landgericht, in an action entitled, "May Film Corporation, represented by its directors, Joe May and Manfred Liebenau" vs. defendant, represented by its attorneys, Counsellor of Justice, Dr. Rosenberger, Dr. Richard Frankfurter, and Dr. Gerhard

(Testimony of H. A. Gebhardt.)

Frankfurter, which said action is numbered with the number of the case given under the German laws, as follows: 74.0.590.26/70.

(2) Judgment rendered July 27, 1932, in the District Court of Appeal in Berlin, Germany, also known as Kammergericht, being No. 25.7.5849/30 74.0.590/26 and that in said action the May Film corporation was in liquidation and was represented by its liquidator, Attorney Dr. Alexander Meier, whose attorney was Dr. Paul Dienstag. That the defendant was represented by its board of directors, President Carl Laemmle, Vice President, Robert H. Cochrane, Secretary Helen E. Hughes, treasurer E. H. Goldstein, and said defendant's counsel was attorney Dr. Saare.

(3) Judgment rendered February 3, 1933, in the Supreme Court of Germany, also known as the Reichsgericht, in which the May Film Corporation was represented by its liquidator, whose attorney was Dr. Fuchlocher, and the defendant was represented by its board of directors, whose attorney was Attorney Counsellor of Justice Dr. Schrombgens.

[Seal] UNION BANK AND TRUST CO. OF LOS ANGELES

By [Illegible]

By DR. R. CAMERON

[Endorsed]: Filed Sept. 24, 1940.

(Testimony of H. A. Gebhardt.)

The Court: It is stipulated that the depositions about to be offered were taken pursuant to stipulation. Do you want to withdraw Dr. Gebhardt while you read that?

Mr. Blum: Yes. This is a deposition which was taken in the case of——

Mr. Selvin: Just a moment. Before you read it I think we should, perhaps, add to our stipulation, with respect to the stipulation of the depositions, that the stipulation provides that all objections, except as to the form of the question, should be reserved to the time of trial.

Mr. Blum: I still think we should introduce a copy of the stipulation. [44]

The Court: That is the usual stipulation.

Mr. Blum: I am about to read from the deposition of Fritz Mandl taken in the action of John Luhring and Margaret Morris, as joint tenants, plaintiffs, against Universal Pictures Corporation, a corporation; Universal Pictures Company, Inc., a corporation, defendants, No. 7962 - Y, which is the action pending in this particular court. The deposition starts out:

> "Luhring v. Universal [45]
>
> "It Is Further Stipulated and Agreed that the notice to be given for the above mentioned hearing is hereby waived."

Mr. Taub was acting as attorney for plaintiff.

(Deposition of Fritz Mandl.)

"Q. (By Mr. Taub): What is your full name? A. Fritz Mandl.

"Q. What is your legal residence?

"A. Monte Carlo.

"Q. Where do you reside in the City of New York at the present time?

"A. Ritz Carlton Hotel.

"Q. Did you ever have a transaction with the Foreign Bank for Commerce at Berlin in which you became a guarantor of an obligation of Mr. Joe May?

"Q. Do you know a Mr. Joe May?

"A. Yes.

"Q. Do you know the Foreign Bank for Commerce at Berlin, Germany?

"A. Yes.

"Q. Did you ever guarantee any obligation of Mr. Joe May to the said Bank for Commerce of Berlin?

"Q. Did you ever have a discussion with Mr. Joe May about guaranteeing something for him with the Bank for [46] Foreign Commerce in Berlin? A. Yes.

"Q. Did you then make arrangements with the Bank for Foreign Commerce to arrange for such a guarantee on behalf of Joe May?

"A. Yes.

"Q. Have you any documents here which pertain to your negotiations with the bank for such guarantee?

(Deposition of Fritz Mandl.)

Mr. Selvin: No. The witness answered "No." [47]

"Q. Where would such documents or letters be?

"Q. Were any documents or letters exchanged between you and the bank pertaining to your taking over this guarantee?

"A. Yes.

"Q. Where are such documents or letters at the present time?

"A. They may be in Vienna, I don't know.

"Mr. Katz: I move to strike out everything other than 'I don't know.'

"Q. Do you think those documents are in Vienna at the present time? [48]

"A. Yes."

The Court: Unless Mr. Selvin indicates that he renews the objection I assume that he doesn't.

Mr. Blum: (Reading)

"Q. In what year did your negotiations with the said bank take place?

"A. 1928 or 1929, I don't know exactly.

"Q. Do you recall whether you were ever called upon to pay to the Bank for Foreign Commerce under the terms of your guarantee?"

Mr. Selvin: Just a moment. We object to that upon the ground that it assumes facts not in evidence; no foundation to show that there ever was a guarantee, or if there was, what its terms were.

(Deposition of Fritz Mandl.)

It further calls for the conclusion of the witness as to whether any payments he might have made were under the terms of the guarantee or under the terms of something else.

(Discussion.)

The Court: I will overrule the objection at the present time. At the conclusion of plaintiffs' evidence you may move to strike, if no proof of a guarantee should appear. Objection overruled.

Mr. Blum: (Reading) [49]

"A. Yes.

"Q. Do you know about when this took place?

"A. Between 1932 and 1934, about.

"Q. Did you make payment to the bank?"

Mr. Selvin: It will be understood that my objection runs to this entire line of testimony, then, relating to payment?

The Court: Yes. And the objection is overruled.

Mr. Blum: (Reading)

"A. Immediately.

"Q. Do you recall in what form payment was made by you to the bank on the said guarantee? A. Yes.

"Q. In what form was payment made?

"A. To the debit of my French franc account with the Bank for Foreign Commerce at Berlin.

(Deposition of Fritz Mandl.)

"Q. As a result of this payment which the bank obtained from you under your guarantee, do you recall that the bank gave you an assignment of a certain claim which they held against Universal Pictures Corporation, New York City, U. S. A.?"

Mr. Selvin: We object to that question on the ground [50] that it assumes facts not in evidence, namely, that there was a guarantee, or that there was an assignment; upon the ground that it calls for a conclusion of the witness as to the effect of certain transactions.

The Court: Objection overruled.

Mr. Blum: (Reading)

"A. Yes.

"Q. Do you recall about when this was?

"A. Between 1932 and 1934.

"Q. Have you got this document showing the assignment by the bank to you of their claim against Universal Pictures Corporation here? A. No.

"Q. Do you know where this document is at the present time? A. No.

"Q. Did you instruct the Bank for Foreign Commerce to notify Universal Pictures Corporation, New York, of the assignment? [51]

"A. No.

"Q. Do you know whether the Bank for Foreign Commerce notified Universal Pictures

(Deposition of Fritz Mandl.)

Corporation at New York City of the assignment of their claim to you? A. Yes.

"Q. Did you ever see the signature of Dr. Eric Lenk who was connected with the Bank for Foreign Commerce at any time?

"A. Yes.

"Mr. Taub: I ask that this paper be marked Plaintiffs' Exhibit 1 for identification."

Mr. Hirschfeld: Here it is.

Mr. Blum: That is only a photograph.

Mr. Hirschfeld: You have got the original in evidence.

Mr. Selvin: It is in as Plaintiffs' Exhibit 5.

Mr. Hirschfeld: Plaintiffs' Exhibit 1 for identification.

Mr. Selvin: It is marked as Exhibit 1 for identification in the deposition, but it is in evidence as part of Plaintiffs' Exhibit 5.

Mr. Hirschfeld: Yes.

The Court: All right. You don't have to introduce it [52] again. Just identify it.

Mr. Blum: This is the document which has been marked Plaintiffs' Exhibit 1 for identification, April 15, 1940, initialled by the Notary, which is a duplicate original of Plaintiffs' Exhibit 5.

The Court: All right.

Mr. Selvin: That is part of Plaintiffs' Exhibit 5, you mean?

Mr. Blum: Pardon?

(Deposition of Fritz Mandl.)

Mr. Selvin: It is a duplicate of a part of Plaintiffs' Exhibit 5, being that part which consists of the letter, dated February 12, 1936, from the Bank for Foreign Commerce.

Mr. Blum: That is correct.

The Court: All right. Proceed.

Mr. Blum: (Reading)

"Q. I show you Plaintiffs' Exhibit 1 for identification and ask you whether you recognize the signature of Dr. Eric Lenk on the said document? A. Yes.

"Q. And you know this signature to be the signature of Dr. Eric Lenk?

"Q. Do you know what position Dr. Eric Lenk held at the Bank for Foreign Commerce at the time this document was executed in February 1936? [53] A. Yes.

"Q. What was his position at the time?

"A. A member of the Board.

"Q. Do you know whether he was authorized to execute important documents on behalf of the said Bank for Foreign Commerce?"

Mr. Selvin: I object to that upon the ground that it calls for a conclusion of the witness and is hearsay.

The Court: You couldn't prove agency that way, with someone that wasn't connected——

Mr. Blum: That was the question.

(Deposition of Fritz Mandl.)

The Court: I will sustain the objection to the question.

Mr. Blum: The next answer, then, will not be given.

The Court: No. The objection is sustained.

Mr. Blum: (Reading)

"Q. Did you have transactions of another nature with the same Bank for Foreign Commerce?

The Court: I will sustain it, in view of the court sustaining the objection to the previous question. [54]

"Q. And you were present when Dr. Lenk did sign other important documents as an authorized officer of the said bank?"

Mr. Selvin: I object to that upon the same grounds previously urged, upon the further ground that it calls for the conclusion of the witness.

The Court: Objection sustained.

Mr. Blum: (Reading)

"Q. Did you ever see this document before?"

The witness's attention was undoubtedly directed to Plaintiffs' Exhibit 1 for identification, which is Plaintiffs' Exhibit 5. At least, that is my conclusion.

"A. I can't remember.

"Q. You do remember, however, that the Bank for Foreign Commerce notified Universal

(Deposition of Fritz Mandl.)

Pictures Corporation of New York of the fact that they had assigned to you the claim which they held against Universal Pictures Corporation?"

Mr. Selvin: We object to that upon the ground that it is self-serving, leading, calling for a conclusion of the witness and it is hearsay.

The Court: In view of the stipulation made in conjunction with the notice, I don't think this is material. Mr. Selvin is willing to admit, in regard to the third document in Exhibit 5, that it was actually sent and received, for whatever it may be worth. In view of that I will sustain the objection. [56]

Mr. Blum: (Reading)

"Q. I show you a document, Plaintiff's Exhibit 2 for identification, and ask you whether it is your signature?"

Mr. Selvin: That is already in evidence as Plaintiffs' Exhibit 6, isn't it? It is the assignment from Mandl to the Union Bank.

Mr. Hirschfeld: Yes.

The Court: All right.

Mr. Blum: (Reading)

"A. Yes.

"Q. Do you recall when you executed this document? A. Yes, 1936.

"Q. I show you the document marked

(Deposition of Fritz Mandl.)

Plaintiffs' Exhibit 2 for identification and ask you when you affixed your signature?

"A. On April 22, 1936.

"Q. And what does this document represent?

"Q. Is this document an assignment by you of certain claims against Universal Pictures Corporation to the Union Bank and Trust Company of Los Angeles?"

Mr. Selvin: The document will speak for itself.

The Court: Do you insist on the objection? [57]

Mr. Selvin: I do. I think the document speaks for itself.

The Court: Well, he may identify it. Objection overruled.

Mr. Blum: (Reading)

"A. Yes.

"Mr. Taub: I offer it in evidence."

That is the document which has been received as Plaintiffs' Exhibit 6.

"Q. This assignment which you made to the Union Bank & Trust Company originated as an assignment to you from the Bank for Foreign Commerce in Berlin, is that correct?"

Mr. Selvin: I object to it on the ground that it is leading, that it calls for a legal conclusion of the witness upon one of the important issues in the case.

The Court: Objection overruled.

(Deposition of Fritz Mandl.)

Mr. Blum: (Reading)

"A. Yes, the same thing.

"Q. And the assignment which was made to you by the Bank for Foreign Commerce at Berlin, of a claim against [58] Universal Pictures Corporation, was made after you had paid your guarantee to the Bank for Foreign Commerce in French francs?"

Mr. Selvin: I object to that on the ground that it assumes facts not in evidence, namely, that there was an assignment from the Bank for Foreign Commerce to the witness, and secondly, that there was a guarantee, and further, it calls for a conclusion of the witness.

The Court: Objection overruled.

Mr. Blum: (Reading)

"A. Yes.

"Q. I show you Plaintiffs' Exhibit 3 for identification and ask you whether that is your signature? A. Yes."

What is Plaintiffs' Exhibit 3?

Mr. Selvin: Plaintiffs' Exhibit 7, the power of attorney.

Mr. Blum: (Reading)

"Q. Do you recall when you signed this document? A. 1936.

"Q. Does this represent a power of attorney which you gave to Mr. Ellis S. Hirschfeld at Los Angeles and to Dr. Gebhardt of the firm

(Deposition of Fritz Mandl.)

of Rotz, Bridges & Gebhardt, also attorneys at Los Angeles, to repreesnt you in your action against Universal Pictures Corporation, Los Angeles? [59]

That has already been received.

"Q. When you made payment to the Bank for Foreign Commerce in Berlin on your guarantee in the Joseph May matter, do you know whether the said bank obtained the permission of the Foreign Exchange Control Office at Berlin?

Mr. Selvin: We object to that upon the ground that it is not the best evidence and no way to prove an official document or transaction in Germany. This is a matter of some importance, because, I think, the law agrees that such a permit would be necessary to the validity of the transaction. I think we are entitled to have a copy, or if there is a permit——

The Court: Objection sustained.

Mr. Blum: (Reading)

"Q. When the bank delivered to you the assignment of their claim against Universal Pictures Corporation, do you know whether they obtained the permission of the Foreign Exchange Control Office at Berlin?"

Mr. Selvin: I make the same objection as to the last question and answer.

The Court: Objection sustained.

(Deposition of Fritz Mandl.)

Mr. Blum: Then followed the cross examination by Mr. Katz.

"Q. (By Mr. Katz) Mr. Mandl, in 1928 or 1929 were you a citizen of Austria? [60]

"A. Yes.

"Q. Where were you in 1928?

"A. Vienna.

"Q. During the whole time?

"A. No.

"Q. Do you recall whether——"

"Q. Do you recall whether during the year 1928 you went to Berlin, Germany?

"A. Every month.

"Q. And is that likewise true with respect to the year 1929?

"A. Yes, until 1933.

"Q. Are you a citizen of Austria?

"A. Yes.

"Q. Did you ever have an account with the Bank for [61] Foreign Commerce in Berlin?

"A. Yes.

"Q. When did you open that account?

"A. At the time of the formation of the bank as a matter of course, 1924 or 1925.

"Q. And at the time of the opening of that account did you have a French franc account?

"A. I don't know.

"Q. Do you recall when you first opened a French franc account with the Bank for Foreign Commerce in Berlin?

(Deposition of Fritz Mandl.)

"A. No.

"Q. Did you have anything to do with the organization of the May Film Corporation?

"A. No.

"Q. Were you at any time an officer of the May Film Corporation?

"A. That may be, I don't know.

"Q. Were you at any time a stockholder of the May Film [62] Corporation?

"A. No.

"Q. Were you at any time a director of the May Film Corporation?

"A. I don't know.

"Q. Were you at any time an officer of the Bank for Foreign Commerce?

"A. No.

"Q. Were you at any time a director of the Bank for Foreign Commerce? A. No.

"Q. Were you at any time a stockholder of the Bank for Foreign Commerce?

"A. No.

"Q. Do you recall that at one time the May Film Corporation arranged for a credit from the Bank for Foreign Commerce? [63]

"A. Yes.

"Q. Do you recall what the amount of that credit was?

"A. I believe 100,000 marks.

"Q. Do you recall when that occurred?

(Deposition of Fritz Mandl.)

"A. I don't know, between 1928 and 1930, probably. I can't recall the years.

"Q. Do you recall that the May Film Corporation was in liquidation at the time that it arranged for a credit from the Bank for Foreign Commerce in the sum of approximately 100,000 marks?

"A. I don't know, no.

"Q. I show you Plaintiffs' Exhibit 2 for identification and ask you whether that refreshes your recollection that at the time that the May Film Corporation arranged for a credit of 100,000 marks with the Bank for Foreign Commerce that the May Film Corporation was in liquidation?

"A. No.

"Q. I again show you Plaintiffs' Exhibit 2 for identification and ask you whether that refreshes your recollection as to the date when the May Film Corporation arranged for a credit of 100,000 reichmarks with the Bank for Foreign Commerce?

"A. No.

"Q. I again show you Plaintiffs' Exhibit 2 for identification and ask you whether that refreshes your recollection as to the date when you first opened a French franc account [64] with the Bank for Foreign Commerce.

"A. No.

"Q. Do you recall whether at the time that

(Deposition of Fritz Mandl.)

the May Film Corporation arranged for a credit of 100,000 marks with the Bank for Foreign Commerce that you executed any papers or writings?

"A. Yes.

"Q. Do you have the papers or documents or writings which you executed at that time?

"A. No.

"Q. Do you recall where you executed those papers or documents or writings?"

There was an objection and the question was rephrased.

"Q. Do you recall in what city you executed or signed those papers or documents or writings?

"A. In Vienna or Berlin.

"Q. Is Mr. Joe May related to you?

"A. Very distant.

"Q. Do you know whether in 1928 to 1931 Mr. Joe May was a citizen of Germany?

"A. I don't know.

"Q. Do you recall whether Mr. Joe May left Germany after 1928 or 1929?

"A. Yes.

"Q. Do you know when Mr. Joe May left Germany?

"A. No. [65]

"Q. Mr. Mandl, did the Bank for Foreign Commerce ever deliver to you any stocks or bonds or other securities which had been

(Deposition of Fritz Mandl.)

pledged with it in connection with any loans to the May Film Corporation?

"A. No.

"Q. Mr. Mandl, do you have here any statements rendered to you by the Bank for Foreign Commerce for the period from 1929 through 1937?

"A. No.

"Q. Mr. Mandl, at the time that the May Film Corporation arranged for the credit of 100,000 marks with the Bank for Foreign Commerce, did you at that time have on deposit with the Bank for Foreign Commerce, and to your credit, any marks?

"A. No.

"Q. Mr. Mandl, in 1936, did you have on deposit with the Bank for Foreign Commerce any marks?

"A. No.

"Q. Did you know that in 1936 the May Film Corporation was in liquidation?

"A. No.

"Q. Did you ever know that the May Film Corporation was or had been in liquidation?

"A. Yes.

"Q. When did you first ascertain that the May Film Corporation was in liquidation? [66]

"A. I don't know.

"Q. What is your best recollection as to

(Deposition of Fritz Mandl.)

when you first ascertained that the May Film Corporation was in liquidation?

"A. I know that when Mr. Joe May left, the May Film Corporation was in liquidation.

"Q. When you say at the time that Joe May left, you mean at the time Joe May left Germany?

"A. Yes.

"Q. Do you know who the liquidator was of the May Film Corporation at the time that Joe May left Germany?

"A. No.

"Q. Did you ever hear of a man by the name of Hausdorf?

"A. No.

"Mr. Katz: That's all."

The Court: The deposition will be received in evidence and marked as Plaintiffs' Exhibit No. 9, and it will be transcribed in any record made of these proceedings.

Mr. Blum: This is the deposition of Erich Lenk, taken on stipulation, which stipulation was forwarded to the Notary, which has not been attached to the deposition. May [67] we have the same stipulation with regard to the Lenk deposition as we had with regard to the Mandl deposition?

Mr. Selvin: The same stipulation?

Mr. Blum: Yes.

Mr. Selvin: Yes. [68]

"Witness:

DR. ERICH LENK

"Direct Examination

"By Mr. Taub

"Q. What is your full name?

"A. Erich Lenk.

"Q. Where do you reside?

"A. 1781 Riverside Drive, New York City.

"Q. When did you arrive in the United States?

"A. In November, 1937.

"Q. Do you know a Mr. Joe May?

"A. I know him personally.

"Q. And where did you meet him?

"A. I met him in Berlin, Germany.

"Q. Do you know a Mr. Julius Aussenberg?

"A. I know him personally.

"Q. And where did you meet him?

"A. In Berlin.

"Q. Do you know a Mr. Fritz Mandel? [69]

"A. I do know Mr. Fritz Mandel."

Mr. Selvin: May I ask counsel for a stipulation at this point? In the deposition the word "Mandl" is misspelled all the way through as M-a-n-d-e-l. It should be M-a-n-d-l.

The Court: All right.

Mr. Selvin: Will counsel stipulate that that is the same person?

The Court: The signature will show the correct spelling.

(Deposition of Dr. Erich Lenk.)

Mr. Hirschfeld: Yes. I will stipulate that that is the same Fritz Mandl that has been mentioned.

Mr. Selvin: The same Fritz Mandl that has been mentioned, and will continue to be mentioned in this lawsuit.

"Q. And where did you meet him?

"A. In Berlin for the first time.

"Q. Were you ever connected with the Bank for Auswartigen Handel?

"A. Yes.

"Q. Were you ever an officer of the said bank?

"A. I was.

"Q. In your capacity, as an officer of said bank, did you ever arrange for loans with customers?

"A. I did.

"Q. Was the May Film, A. G. a customer of you bank?

"A. Yes.

"Q. Do you recall whether you negotiated with Mr. Joe [70] May, who represented the May Film, A. G.?

"A. I did.

"Q. Did you ever negotiate regarding a loan with May Film, A. G.?

"A. I did.

"Q. Do you recall approximately in what year that was?

(Deposition of Dr. Erich Lenk.)

"A. Between 1928 and 1930.

"Q. Do you recall the amount of the loan, approximately?

"A. Approximately 80,000 Reichsmarks

"Q. Were you present during the negotiations for the loan?

"A. I was.

"Q. Do you recall what arrangements were made to obtain collateral for the said loan in favor of your bank?

"A. I do.

"Q. And will you tell us, please, what arrangements were made in regard to this particular loan for collateral in favor of your bank?"

Mr. Selvin: I object to that on the ground that it is not the best evidence, and calls for a conclusion of the witness.

The Court: Well, we do not know whether negotiations were later reduced to writing. Until we do, it may be material.

Mr. Blum: (Reading)

"A. Different collaterals for the loan, personal [71] guaranty of Mr. Joe May, personal guaranty of his wife, a valuable stamp collection in the possession of Mr. May, and the personal unlimited guaranty of Mr. Fritz Mandel. And furthermore, the assignment of a claim of

(Deposition of Dr. Erich Lenk.)

the May Film A. G. against Universal Pictures Corporation of New York.

"Q. Do you recall the approximate amount of this claim of the May Film A. G. against Universal?

"A. The principal was 50,000 marks, and there was a very large amount of interest.

"Q. Do you know whether May Film A. G. or Mr. Joe May paid the loan to your bank when it was due?

"A. Yes.

"Q. Will you tell us whether payment was made to the bank?

"A. Yes, the loan was not paid.

"Q. Did you on behalf of your bank make a claim for the payment of this loan to the guarantor, Mr. Fritz Mandel?

"A. I did.

"Q. And did Mr. Fritz Mandel pay the said loan to your bank under the terms of his guaranty?

"A. Yes.

"Q. Do you recall how payment was made to your bank?

"A. I do recall.

"Q. In what form?

"A. Mr. Fritz Mandel had a sizeable balance to his credit with our bank and we charged his account with the sum [72] for which he was the guarantor.

(Deposition of Dr. Erich Lenk.)

"Q. After Mr. Fritz Mandel paid under the terms of his guaranty, did your bank notify Universal Pictures Corporation of New York City that the judgment which the May Film A. G. obtained against Universal Pictures Corporation had been assigned and now belongs to Mr. Fritz Mandel?

"A. No.

"Q. What was your position with the bank for Auswartigen Handel on or about February 25, 1936?

"A. I was Vorstandes Mitglied."

Dr. Gebhardt: What is that?

Mr. Hirschfeld: Member of the board of directors.

Dr. Gebhardt: Member of the board of directors.

Mr. Blum: (Reading)

"Q. I show you Plaintiffs' Exhibit 1 marked for identification on April 15, 1940, at the hearing of Mr. Fritz Mandel, another witness in this case, and ask you whether this exhibit contains your signature?

"A. It does.

"Q. I show you Plaintiffs' Exhibit 1 marked for identification and offered in evidence, subject to objection, and ask you whether this is a duplicate original of an original letter sent to Universal Pictures Corporation, New

(Deposition of Dr. Erich Lenk.)

York, on February 25, 1936, by your bank under your signature?

"A. Yes."

Mr. Hirschfeld, for the purpose of the record will you [73] identify that?

The Court: It is the letter, in German, attached to Exhibit 5, dated February 12, 1936.

Mr. Blum: (Reading)

"Q. Did you, on behalf of your bank, obtain a promise from the Foreign Exchange Control Office in Berlin for the transfer and assignment of the judgment obtained by May Film A. G. against Universal Pictures?"

Mr. Selvin: We object to that on the ground that it calls for a conclusion of the witness; on the further ground that it is not the best evidence of the granting of any such permit.

The Court: Objection overruled.

Mr. Blum: (Reading)

"A. I did.

"Q. Are you still connected with this bank which is mentioned in the testimony herein?

"A. No.

"Q. When did you terminate your connection with the said bank?

"A. On May 31, 1937. [74]

"Q. Are you in the possession of any of the documents at this time pertaining to the transaction mentioned in your testimony today?

(Deposition of Dr. Erich Lenk.)

"A. No.

"Q. In your opinion, where are the documents which I just referred to?

"A. In the archives of the Bank for Auswartigen Handel.

"Q. I presume you mean in the City of Berlin, Germany?

"A. Yes."

"Cross Examination

"By Mr. Katz

"Q. Doctor, you were asked a question about whether you, on behalf of your bank, got a certain type of authorization from some agency in Germany with respect to the transfer of a judgment. Do you recall being asked that question?

"A. I do.

"Q. Whatever it was that was received, was in writing, was it not?

"A. It was.

"Q. And in answering the question that was put to you, you gave your interpretation of the writing, is that right?

"A. Yes. [75]

"Q. Did you ever see the writing which formed the basis of the opinion which you expressed in answer to the question that you did obtain that type of permission?

"A. Yes.

(Deposition of Dr. Erich Lenk.)

"Q. When did you last see it?

"A. The latest, beginning 1937.

"Q. So that in testifying here today, you are recalling the contents of that paper which you saw in 1937, is that right?

"A. Yes.

"Q. And then, based upon your recollection of what was in that paper, you told us that it was a permission?

"A. Yes."

Based on that testimony in the cross examination I now move to strike the answer to the question at the bottom of page 8 and the answer at the top of page 9 of the deposition, relating to an alleged promise from the Foreign Exchange Control Office to the transfer and assignment of the judgment, on the ground that the question calls for, and the answer gave evidence that was not the best evidence of the facts in that regard, it appearing that the promise or permit or whatever it was, was in the form of an official written document.

Mr. Blum: The deposition also states that those documents, the last he ever saw them, were somewhere in Berlin.

Mr. Selvin: There is no proof that they are unavailable. [76]

The Court: No.

Mr. Selvin: There is no testimony that the bank is out of business, and there is no testimony that

(Deposition of Dr. Erich Lenk.)

the Berlin Foreign Exchange Control Office is out of business. On the contrary, I understand it is very much in business at the present time. That is an official government body. I am not urging the objection to be captious, but it is likely to be of some moment in this case and I think the plaintiff should produce the document so its interpretation will be authenticated, rather than the guess of a layman.

Mr. Hirschfeld: Your Honor, we will show a little later in the case that the Devisen stelle handles, through some 18,000 employees thousands upon thousands of such transactions, and that the permit which is issued is a printed form, very short and very familiar to all banks and banking people, and that the mere seeing of the form, we contend, would be sufficient for the witness to say that he did get the permit; in the same manner that if any of us were unfortunate enough to receive traffic tickets by the thousands, as Mr. Lenk had probably received these permits, we wouldn't have to handle it to see if it was a traffic citation.

Mr. Selvin: I have what purports to be an English translation of this particular permit. It does not authorize a transfer of this judgment to an Austrian national, in my judgment.

Mr. Hirschfeld: Since counsel has the translation, [77] perhaps that is the best proof of the transaction. We understand the bank is out of business and has been out of business for quite

(Deposition of Dr. Erich Lenk.)

some time. Secondly, we ask the court to rely upon the general presumption that a bank in Germany, especially in these troubled times, would certainly obey the instructions of the law and comply with the law. We must presume that they will do so. Secondly, since counsel is objecting that we are assuming a fact not in evidence, must not counsel show that such a permit was necessary? It isn't our duty to show that any such permit——

The Court: The point is this: We assume that the permit was necessary. Merely because it involves a transfer of foreign exchange, then I think it would be a collateral matter; but it was necessary, because it involved the transfer of a judgment to the national of another country. Then, of course, it becomes important in determining whether or not the chain of title is complete.

Mr. Hirschfeld: Isn't that a matter of defense?

Mr. Selvin: But the point I make is that you are offering testimony as to a permit. [78]

The Court: I will sustain the objection at the present time. If, in the light of the defense, you decide to offer it later on, then the offer may be renewed.

Mr. Selvin: Continuing the cross examination:

"Q. Now, you testified that May Film A. G. was a customer of the Bank for Auswartigen Handel, is that right?

"A. Yes.

(Deposition of Dr. Erich Lenk.)

"Q. You also testified that the bank had extended a loan or a credit to May Film A. G., is that right?

"A. Yes.

"Q. Was the loan the subject of a written paper or document?

"A. It was.

"Q. Did you ever see that written paper or document?

"A. I did.

"Q. When did you last see it?

"A. Approximately 1928.

"Q. You testified that certain things were put up as collateral in connection with the loan, is that right?

"A. I did.

"Q. Now, was the collateral that was put up by Joe May something that existed in the form of a writing?

"A. Yes.

"Q. And when you said that as collateral Joe May made [79] a certain type of guaranty, you were referring to the writing, is that right?

"A. Yes.

"Q. In other words, when you called that paper a guaranty, you were giving us your understanding of what was in the paper?

"A. Yes or no, I cannot answer.

"Q. Do you recall Mr. Taub asked you whether Joe May personally guaranteed the

(Deposition of Dr. Erich Lenk.)

May Film A. G. loan and you answered 'yes'. Do you recall that?

"A. I don't recall.

"Q. Do you recall stating that as part of the collateral of the May Film A. G. loan, the bank had a guaranty from Joe May?

"A. Yes.

"Q. That paper was in writing?

"A. Yes.

"Q. Do you recall what that paper said, in so many words, correctly and accurately?

"A. No, not in detail.

"Q. Do you also recall that you said Fritz Mandel gave a guaranty?

"A. I did say it.

"Q. Were you referring to a paper in writing?

"A. Yes.

"Q. Do you recall exactly what that said?

[80]

"A. No.

"Q. Do you recall that you testified that a judgment was put up as collateral?

"A. I do.

"Q. Was that pursuant to a paper in writing?

"A. Yes.

"Q. And do you recall the exact language of that paper?

(Deposition of Dr. Erich Lenk.)

"A. I don't recall.

"Q. With respect to that judgment, weren't there two pieces of paper executed?

"A. I don't get that.

"Q. Wasn't there more than one writing executed with respect to that judgment?

"Q. Do you understand my question?

"A. No. In which sense do you mean executed?

"Q. Signed. Wasn't there a piece of paper executed which said what that judgment was to be collateral for?

"A. There was.

"Q. It would make a difference, would it not, whether that piece of paper said that the judgment was to be collateral for a guaranty, or whether the judgment was to be a collateral for the loan?

A. It would." [81]

Mr. Selvin:

"Q. You testified that there came a time when a certain debit was made, or a certain charge was made in Fritz Mandel's account. Do you recall that?

"A. I do.

"Q. Was that pursuant to an express authorization in writing from anybody?

"A. No."

Mr. Selvin:

"A. No.

(Deposition of Dr. Erich Lenk.)

"Q. In other words, the bank had certain deposits which belonged to Fritz Mandel and the bank claimed that Fritz Mandel owed it some money under a writing, and so the bank proceeded to charge Fritz Mandel's account, is that right?

"A. Exactly.

"Q. Will you look at plaintiff's Exhibit 1 for [82] identification, which consists of three pages, and tell me on which page your signature appears?

"A. On page 2.

"Q. And is it the first signature which appears on page 2?

"A. Yes.

"Q. Whose signature is the second signature on page 2?

"A. The second signature is the signature of Kurt Schlesinger.

"Q. And whose signature is the third signature on page 2?

"A. The third signature is the signature of a Notary Public, a German Notary Public.

"Q. The bank for Auswartigen Handel was an aktiengesellschaft, was it not?

"A. Yes."

Mr. Hirschfeld: We will stipulate that the word "stock company" may be inserted in place of "aktiengesellschaft".

(Deposition of Dr. Erich Lenk.)

The Court: All right.

Mr. Selvin: A stock company or corporation.

"Q. And as an aktiengesellschaft it had a charter and it had by-laws?

"A. Yes.

"Q. And the Bank for Auswartigen Handel also had a Board of Directors, did it not? [83]

"A. It did.

"Q. Prior to the time that you signed Plaintiff's Exhibit 1 for identification, was there any resolution passed by the Board of Directors with respect to plaintiff's Exhibit 1 for identification?

"A. No.

"Q. Was Fritz Mandel at any time an officer, director or stockholder of the bank?

"A. He was not an officer and not a director. If he was a stockholder, I don't know.

"Q. Did you know Mr. Fritz Mandel well?

"A. Well yes, I knew him.

"Q. You knew him in a business sense?

"A. Yes.

"Q. And you came in frequent contact with him?

"A. I did."

That is the end of the cross examination, and in view of that cross examination I have a certain motion to strike, as soon as I locate the particular portion.

(Deposition of Dr. Erich Lenk.)

"Redirect Examination

"By Mr. Taub. [84]

"Q. When you, Dr. Lenk, acting on behalf of your bank were negotiating for the loan which we are talking about here, did you also negotiate for the guaranties with Mr. Joe May and Mr. Fritz Mandel?

"A. Yes.

"Q. And the written papers which were executed and about which you testified on the cross examination a few minutes ago were the result and contained guaranties that you negotiated with Mr. Joe May and Mr. Fritz Mandel?

"A. Yes.

"Q. In your capacity as an officer of the bank, did you require authority from the Board of Directors to write letters?

"A. No.

"Q. And when you wrote the letter which is marked plaintiff's Exhibit 1 for identification, you did not ask for authority, and you did not obtain such authority from the Board of Directors?

"A. I did not.

"Q. Do you know whether the Board of Directors did act on the contents of your letter before you wrote it?

"A. I know that it did not act."

That is the conclusion of the deposition. It is signed and notarized in proper form, I am willing to stipulate. I move to strike the testimony of

(Deposition of Dr. Erich Lenk.)

the deposition just read, beginning on page 4 with the question: "Do you recall the [85] amount of the loan, approximately?" and the answer, "Approximately 80,000 Reichsmarks." Then the answer to the question on page 5, the question being, "And will you tell us, please, what arrangements were made in regard to this particular loan for collateral in favor of your bank?", upon the ground that the questions call for and the answers contain what is not the best evidence of the transactions; it having been testified by the witness that the transactions were reduced to writing, and there being no proof of the destruction or the non-availability of the writings at this time or at the time the deposition was taken. [86]

The Court: I will overrule the objection. I think it is a strong, arguable point on the sufficiency of notice. I will deny the motion to strike and overrule the objections to the particular questions. The deposition, with the deletion of the questions to which objection was sustained, will be received in evidence and marked as Plaintiffs' Exhibit 10. [92]

The Court: I think, gentlemen, there is one thing we overlooked. I think this translation should be received, along with the other, in view of the fact that there is a difference in the wording. This may be received as plaintiffs' next exhibit.

The Clerk: Plaintiffs' Exhibit 11. [93]

(Deposition of Dr. Erich Lenk.)

PLAINTIFFS' EXHIBIT No. 11

Bank of foreign Commerce
Stock Corporation.

Berlin, February 25, 1936.
Markgrafenst. 40.

Universal Pictures Corporation
New York/U.S.A.

Herewith we wish to advise you as follows:

The following assignment was given to our bank as security for our claims against Mayfilm Corporation in Liquidation under date of February 9, 1933:

"Universal Pictures Corporation, New York, has been ordered to pay according to the court files 25.U.5849/30 of the District Court of Appeal the sum of RM 50,000 with 2% interest above the discount rate of the Reichsbank from July 1, 1926. The appeal against this judgment of the District Court of Appeal of July 27, 1932 has been denied by judgment of the Supreme Court of February 3, 1933. The judgment stands nominally in the name of Mayfilm Corporation in Liquidation; legally, I the undersigned film director, Joe May am entitled to this claim. My rights concerning this claim are founded upon an agreement between myself and Julius Aussenberg, business man, dated August 29, 1930 according to which this claim

(Deposition of Dr. Erich Lenk.)

against Universal Pictures Corporation was transferred and assigned to me besides other assets of Mayfilm Corporation.

With these premises I hereby assigne the above mentioned claim and judgment to its full extent and with all interest and other rights to the Bank of Foreign Commerce in Berlin SW, Markgrafenst. 41.

Berlin, February 9, 1933.
(Signed): JOE MAY."

As further security for the above mentioned claim against Mayfilm we hold the guarantee of Fritz Mandl, Director General, Hirtenberg, Lower Austria. We have made claim against Fritz Mandl, Director General, based upon this guarantee and he has satisfied in full all our claims against Mayfilm Corporation. Based upon this fact according to the provisions of the German law (Paragraph 774 Civil Code) all rights with all securities are transferred to the guarantor who satisfies the claim of the creditor against the principal debtor. Therefore the claim against you in the amount of RM 50,000 together with 2% interest above the discount rate of the Reichsbank from July 1, 1926, which had been assigned to us has been transferred to the above mentioned Fritz Mandl, Director General, at Hirtenberg, of which fact we are notifying you

(Deposition of Dr. Erich Lenk.)

herewith. You can satisfy this debt only by payment to the above named.

Very truly yours,
BANK OF FOREIGN
COMMERCE.

The forementioned signatures of:

1) Dr. Erich Lenk, member of the board of directors.

2) Kurt Schlesinger, bank manager, both at Berlin W 8, Markegrafenst. 40, who have been authorized jointly to represent the Bank of Foreign Commerce at Berlin are hereby acknowledged.

The foregoing signature of Notary Sigmund Gorski is acknowledged with the remark that he is authorized to certify the document and that the certification is according to the laws of the country.

Berlin, February 27, 1936.

The Presiding Judge of the Superior Court.

(Seal of Superior Court)

By (Signature illegible)

545.36.

8 Reichsmark fee for acknowledgment paid.

Berlin, February 27, 1936.

Office of Superior Court Clerks Department.

(Signature illegible.)

[Endorsed]: Filed Feb. 24, 1940.

H. A. GEBHARDT,

recalled as a witness in behalf of plaintiffs, testified further as follows:

Cross Examination

Q. By Mr. Selvin: Dr. Gebhardt, you were in Germany last year? A. I was.

Q. How long were you there?

A. Four months, approximately.

Q. At that time, of course, this matter of the alleged claim of Fritz Mandl against Universal Pictures Corporation had been referred to you, had it not?

A. It had been referred to me quite a time previous.

Q. And the matter was still pending at the time of your trip to Germany? A. It was.

Q. Did you undertake to examine any records with respect to this claim while you were in Germany?

Mr. Hirschfeld: To which we object on the ground that it is incompetent, irrelevant and immaterial. There is no duty upon Dr. Gebhardt to go and examine that claim, whatsoever. [94]

The Court: I will sustain the objection. There is no showing that they were gathered according to his instructions.

Q. By Mr. Selvin: I call your attention to Section 774 of the Civil Code of Germany, Dr. Gebhardt, which you purported to translate in the

(Testimony of H. A. Gebhardt.)

course of your direct examination. You left out the last sentence of that section, did you not, relating to the proposition that as between themselves co-sureties' rights are the same as those of debtors?

A. I translated the entire section.

Q. Isn't there a sentence at the end there——

A. Oh, pardon me.

Q. ——the meaning of which, in English, is substantially [95] this: Co-guarantors are only liable towards each other under Section 426?

A. That is right.

Q. Will you turn to Section 426 of the German Civil Code?

Q. By Mr. Selvin: Doesn't Section 426 provide, in effect—I will read the English. You have the original in German before you?

A. Yes.

Q. "The joint debtors are, in their relation to each other, indebted in equal parts, unless it is otherwise provided. If the part falling on a joint debtor cannot be obtained from him the deficit shall be borne by the other debtors liable. In so far as the joint debtor satisfies a creditor and is entitled to claim contribution from the other debtor, the claim of the creditor against the other debtor is transferred to him. The transfer cannot be availed [96] of to the injury of creditor." Is that a substantially correct translation of Section 426?

A. That is substantially correct.

(Testimony of H. A. Gebhardt.)

Q. Isn't this the effect of that, under the German law: That when one of two co-guarantors pays the principal debt or claim guaranteed, he is entitled to receive from the other debtors the amount of the contribution to which they are liable?

A. The amount of the contribution—— [97]

A. In my opinion that means that if one of the guarantors pay the share above the share of the guaranty, he can take recourse against the other guarantor.

Q. By Mr. Selvin: And in the absence of agreement the co-guarantors are presumed to be equally liable for the guaranteed obligation as between themselves? [98]

A. As beteween two guarantors, yes.

Q. That is what I am talking about.

A. That is correct.

Q. Of course, the law of Germany, Dr. Gebhardt, is not founded on the common law of England, is it? A. It isn't.

Q. However, the courts of Germany do render decisions or opinions, giving the grounds for the particular decisions which they reach, in some cases, at least?

A. I didn't get that. May I have it?

Q. Well, the courts of Germany do render decisions, and in that connection they render and publish opinions in pretty much the same way as do our own courts here, do they not?

(Testimony of H. A. Gebhardt.)

A. The Supreme Court decisions are published in book form.

Q. And those decisions consist of discussions of the facts in the particular case and the law applicable to that case? [99]

A. Judgments of the Supreme Court are printed and contain decisions and grounds for decisions.

The Court: While they are not binding and there is no principle like our doctrine of stare decisis, because each judge is supposed to follow his own view of the law, nevertheless, by comity——

A. They have great weight.

The Court: ——the judges follow the higher court, just as I will follow even good dictum of the Supreme Court of the United States; is that right?

A. That is exactly the same.

Mr. Selvin: Thank you, your Honor. You have concluded my cross examination.

The Court: All right.

Mr. Selvin: That is all I have at the present time.

Mr. Hirschfeld: Due to the seemingly unending courtesy of Mr. Selvin in this matter, as stated to me earlier in the day, that the amount of money that we are concerned with here, should it become material—and I think he will never agree that it will ever become material—may be determined by Mr. Riedlin, the Assistant Vice President of the Bank of America. He has sent to me a letter with

(Testimony of H. A. Gebhardt.)

various computations, and in lieu of introducing the direct testimony of Mr. Riedlin as to exchange rates or as to discount rates, the documents may be introduced, with the reservation that they are subject to correction for arithmetical errors. [100]

Mr. Selvin: I will stipulate that you may introduce this letter in lieu of Mr. Riedlin's testimony, in that if called he would testify, in substance, to the facts stated in the letter.

The Court: All right. It may be so received.

The Clerk: Plaintiffs' Exhibit 12. [101]

(Testimony of H. A. Gebhardt.)

PLAINTIFFS' EXHIBIT No. 12

Cable Address—Bamerical
13044
Bank of America
National Trust and Savings Association
Please Address Reply to
International Banking Department
660 South Spring Street
Ref.

London Office
12 Nicholas Lane
London E. C. 4

Los Angeles, California
Sept. 24, 1940.

Mr. Ellis I. Hirschfeld,
Suite 1215 Bankers Building,
629 South Hill Street,
Los Angeles, California.

Dear Mr. Hirschfeld:

In accordance with your request I have computed interest on an amount of 50,000 marks from July 1, 1926 to September 24, 1940 inclusive at the official discount rate of the German Reichsbank plus two per cent. The result amounts to Rm. 52,574.33 as per attached detailed statement.

I have also consulted past records and have found that the German Reichsmark was quoted in this country at the following rates:

(Testimony of H. A. Gebhardt.)

July 1, 1926	23.81	per	hundred	Reichsmarks
March 4, 1930	23.86	"	"	"
July 27, 1932	23.72½	"	"	"
Feb. 23, 1933	23.93½	"	"	"
Jan. 2, 1937	40.25	"	"	"
Jan. 2, 1938	40.29	"	"	"
Sept. 24, 1940	40.20	"	"	"

You will find enclosed also a detailed statement showing the discount rates of the German Reichsbank from July 1, 1926 up to date. I sincerely hope that this information will be sufficient for your purposes.

Yours very truly,

G. RIEDLIN
Assistant Vice President.

GR:deh
Enclosure.

(Testimony of H. A. Gebhardt.)

Discount Rates of the German Reichsmark
June 7, 1926—Sept. 24, 1940

June 7, 1926	6½%
July 6, 1926	6
Jan. 11, 1927	5
June 10, 1927	6
Oct. 4, 1927	7
Jan. 12, 1929	6½
Apr. 25, 1929	7½
Feb. 11, 1929	7
Jan. 14, 1930	6½
Feb. 5, 1930	6
Mar. 8, 1930	5½
Mar. 25, 1930	5
May 20, 1930	4½
June 21, 1930	4
Oct. 9, 1930	5
June 13, 1931	7
July 16, 1931	10
Aug. 1, 1931	15
Aug. 12, 1931	10
Sept. 2, 1931	8
Dec. 10, 1931	7
Mar. 9, 1932	6
Apr. 9, 1932	5½
Apr. 28, 1932	5
Sept. 22, 1932	4
Apr. 9, 1940	3½

Mr. Hirschfeld: If your Honor please, we will call Mr. Joe May for one or maybe two questions. [103]

The Court: All right.

JOE MAY,

called as a witness in behalf of plaintiffs, being first duly sworn, testified as follows:

The Clerk: State your name.

A. Joe May.

Direct Examination

Q. By Mr. Hirschfeld: Mr. May, you are the Joe May who is described and mentioned throughout these proceedings? A. Yes, sir.

Q. Did you ever pay any money to the Bank fuer Auswaertigen Handel on an obligation based upon moneys loaned to the May Filk A. G.

A. I paid a little amount for the May Film and then I couldn't pay any more.

Q. I am talking about you personally. Did you personally, of your own money, ever pay the moneys due to the bank from the May Film Company?

A. This question as you put it to me, I paid about 7,000 marks. That was all.

Q. For the May Film Company when you were director of the May Film Company or out of your own pocket book? I am talking about what you paid out of your private money; not what was paid for the May Film Corporation. Did you ever [104] pay that money to the May Film Corporation, that was borrowed? A. No.

Q. Do you know who did? A. Yes.

Q. Who? A. Mr. Mandl.

Mr. Hirschfeld: That is all.

(Testimony of Joe May.)

Cross Examination

Q. By Mr. Selvin: How much had the May Film paid on that loan before Mr. Mandl paid?

Mr. Hirschfeld: That is incompetent, irrelevant and immaterial.

The Court: No. Overruled.

A. Maybe—the judge said "Overruled".

Mr. Hirschfeld: That means you may answer.

A. That was 30,000 or 40,000.

Mr. Hirschfeld: Marks or dollars?

A. 30,000 marks or 40,000 marks. I don't know exactly how much.

Mr. Selvin: That is all. [105]

Mr. Selvin: Counsel has asked me if I will stipulate to offer, as a part of Exhibit 5, a return registry card, which I am willing to stipulate is the return receipt for the letter which is in evidence as Plaintiffs' Exhibit 5. This can be made part of the exhibit.

The Court: It may be made part of the exhibit.

Mr. Selvin: I understand that counsel are willing to stipulate that the letter which I am about to offer, dated March 4, 1936, on the letterhead of Universal Pictures Corporation, signed by Willard S. McKay, was in fact written by him; that he was at that time general counsel for that corporation

and that the letter was received by the addressee in due course of the mails. I offer that letter in evidence; it being the reply to Plaintiffs' Exhibit 5.

The Court: It may be received.

The Clerk: Defendants' Exhibit B. [116]

DEFENDANTS' EXHIBIT B

Universal Pictures Corporation
Rockefeller Center
New York

Willard S. McKay
General Counsel

March 4th, 1936

Ratzer, Bridge & Gebhardt, Esqs.,
311 South Spring Street,
Los Angeles, Cal.

Gentlemen:

We are in receipt of your letter of February 25th, enclosing a letter from the Bank Fur Auswartigen Handel Aktiengesellschaft, together with what purports to be a translation.

Universal Pictures Corporation has never recognized the validity of the claim in question.

Very truly yours,
WILLARD S. McKAY

[Endorsed]: Filed Sept. 25, 1940.

The Court: All right.

Mr. Selvin: I next offer, as part of one exhibit, certified copies of, first, a judgment of the Landericht in Berlin, Germany, in an action between Universal Film, Atiengesellschaft, as plaintiff, and May Film, Aktiengesellschaft, as defendant, it being dated the 6th of December, 1935; and a judgment of the Kammergericht, dated April 30, 1936, in an action between the same parties, it being the same case on appeal.

Mr. Hirschfeld: We want to object on the ground that it is incompetent, irrelevant and immaterial.

Mr. Blum: It does not pertain to the subject matter of this lawsuit. It appears to be a different lawsuit, entirely, between the parties. **[117]**

The Court: Objection overruled. It may be received.

The Clerk: Defendants' Exhibit C.

Mr. Blum: Exception. **[118]**

The Court: Objection overruled. **[119]**

E. O. F. GOLM,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: E. O. F. Golm.

Direct Examination

Q. By Mr. Selvin: You live in Los Angeles, Dr. Golm? A. Yes I do.

Q. Did you ever reside in Germany?

A. I did.

Q. For what period of time?

A. From my birth in 1885 up to the end of 1937.

Q. What profession did you follow in Germany?

A. I followed the judiciary profession.

Q. For what period of time?

A. I commenced to study law in 1904, first in Switzerland and then at the University of Berlin. I passed the first bar examination in 1907 and the so-called State Board examination, which is the final examination, in 1912.

Mr. Hirschfeld: We will stipulate to the witness's qualifications.

The Court: I think we should.

Mr. Selvin: I think the court should know something about it.

The Court: They use terminology a little different than [120] we do here, so it is just as well for the Doctor to explain to us what position he had.

(Testimony of E. O. F. Golm.)

A. Well, from 1907 until 1912 I worked in the so-called Preparation Service which is called the Referendar. I was appointed gerichts assessor in 1912. That is I qualified to be appointed as a judge in Germany in 1912 and I worked for a certain time in the office as a commissioned prosecuting attorney then was appointed judge for lifetime in Germany by the former King of Prussia in 1917. If the court wants to see this——

The Court: I don't think it is necessary. I am familiar generally with the training that the judges receive in Germany. It is quite different from our system.

A. I was a judge in Germany from 1912. In fact, I was appointed as judge, for lifetime, from 1917 on. And I worked as judge at different offices, municipal court and superior court, and also was chief justice of our so-called Schwurgericht. The grand jury would be the corresponding term in English. Presiding judge of the grand jury—I am not quite sure about this. We had grand juries at this time and presiding judges. And I also worked for many years in the government, in the Ministry of Justice in Berlin, in the Administration and in a court which specially dealt with crimes committed by officials, and my official title was Landgerichtsrat at that time. Later on I resigned from my official position as a judge and worked [121] as a lawyer and notary in Germany until I left Germany for

(Testimony of E. O. F. Golm.)

this country, which was in 1937. I was, upon my application, discharged from this position when I arrived in this country in December, 1937. I think it was the 3rd of December. I am not quite sure.

Q. By Mr. Selvin: As a judge in Germany, you sat, did you not, in cases of the sort that we would call civil cases?

A. Oh, yes, for years. And I also had taught law. I had a special order given to me by the administration to teach law to the Referendar, which means to the students who are ready to graduate in the preparatory service.

Q. Were you ever a judge of the Amtsgericht in Charlottenburg?

A. Yes, I was; but, in fact, at that time I worked in the Ministry of Justice, so my office was taken by a person to replace me.

Q. Are you familiar with the official seal of that court? A. Yes. [122]

Q. Dr. Golm, in preparation for your testimony in this case on the German law you have read and studied, have you not, the judgments which were rendered in the action between May Film Aktiengesellschaft and Universal Pictures Corporation, [129] which are included as part of Plaintiffs' Exhibit 1 here? A. I did.

Q. You have also read and studied the judgment rendered in the action between the Bank for Foreign Commerce and May Film Aktiengesell-

(Testimony of E. O. F. Golm.)

schaft, which is in evidence here as Plaintiffs' Exhibit 3, I believe; the declaratory judgment?

A. I did likewise.

Q. Dr. Golm, under the law of Germany during the period involved here, let us say from 1926 to 1936, what was the status of an ordinary business corporation?

A. Well, we have different kinds of business corporations, which are persona juris, which means a stock company, an association with limited liability, cooperative associations, and so on. As far as the stock company is concerned, I think it is the only one which appears in this trial.

Q. Is a stock company the one that is known in German as "Aktiengesellschaft"? [130]

A. "Aktiengesellschaft" is the correct translation of the stock company.

Q. And as I understand it, in German law persona juris is a legal entity?

A. Yes. A stock company, as far as organization is concerned, must have a so-called vorstand; that is, a governing body. It must have an aufsichtsrat. That means a board of supervisors. It must have a meeting of the members, or in German, mietgliederversammlung. All these three are organs of the aktiengesellschaft.

Q. Such corporations have what we call stockholders in this country?

A. Yes, they have stockholders.

(Testimony of E. O. F. Golm.)

Q. Under the law of Germany do the stockholders have any title or interest in and to the property of the corporation?

Mr. Hirschfeld: We would like to adhere a little more closely to the rules for testifying to foreign law by experts. We would like to know what, in his opinion, is written law; and for that purpose I would like counsel to have the witness designate the code law or citations as to these laws, rather than accept his interpretation or his opinion.

The Court: That is cross examination. An expert may give his opinion as to what the law is. Then it is on cross examination that you can have him designate particular [131] sections.

Mr. Selvin: Read the question.

(Question read by reporter.)

A. Well, the stockholders, as such, have no title or right whatsoever to the property of the corporation. They have an interest, indirectly, in so far as they are holding stocks or shares of the company, which represent a share in the property of the company as a whole; but they have no title or right whatsoever to dispose of the property belonging to the company.

Q. Do your answers in that regard apply to property which is in the form of a claim against another person, rather than a firm or some corporeal or tangible property?

(Testimony of E. O. F. Golm.)

Mr. Hirschfeld: I object to the question as calling for a conclusion of the witness.

The Court: Objection overruled.

A. The notion or conception of property literally translated would mean eigentum, and this is a notion which is applicable only to corporeal things. If it is a claim we don't speak about eigentum, at least not in the proper terminology of law, but we use another term for the holder, which is inhaber. That means he holds a claim, or in English you would say he owns a claim.

Q. By Mr. Selvin: Do your answers, with respect to the interest or lack of interest of the stockholders in the property or assets of the corporation, apply in the same way [132] to claims which a corporation holds?

A. Certainly they do; certainly.

Q. What act or acts would have to be performed under the law of Germany, in order to effect a valid transfer to a third person, who is also a stockholder of a business corporation, of a part of the corporation property or rights which it owns or holds?

A. Provided there isn't a special rule in the statutes of the company, the organ which represents the company, the legal representative of the company is the only competent one to dispose of such property or claims and to assign or transfer property or claims to a third person. And in this

(Testimony of E. O. F. Golm.)

connection it doesn't make any difference whether this third person is a stockholder or is a third person which doesn't hold any stock or doesn't have any interest whatsoever in the company; even not an economic interest.

Q. Would an agreement between two stockholders of a company, in which between the two of them they owned all of the stock, with respect to the transfer or disposition of a part of the company's assets to one of the stockholders, have any effect as a transfer of those assets, in German law, without any act of the governing body in the execution of a document of transfer or assignment in pursuance of that act?

A. It would not have any effect in this meaning. It would create certain obligations between the two stockholders, [133] but it would not have any effect binding upon a corporation or binding upon anybody else, as far as a transfer of this property or claim is concerned.

Q. Dr. Golm, for the purpose of expressing an opinion as to the German law I want you to assume certain facts to be true; assume them for the purpose of a question only. Let's assume that about the 10th of May, 1926 an American corporation enters into a contract with a German business corporation, which contract provided by its terms that it was to be governed by the laws of Germany, the contracts further provided that in

(Testimony of E. O. F. Golm.)

case of any violations of the contract the violating party must pay to the faithful party a contractual penalty of 50,000 marks. Prior to the year 1930 but after the contract was entered into the American corporation violated the contract, under circumstances entitling the German corporation to the contractual penalty of 50,000 marks. That an action was commenced in the Landgericht of Germany against the American corporation for the purpose of recovering and enforcing that contractual penalty of 50,000 marks. That on or about March 4, 1930 the Landgericht rendered a judgment that the German corporation was not entitled to recover the contractual penalty. That shortly after the rendition of that judgment and while proceedings to carry the case on in the Kammergericht were pending, two persons—we will call them, for the sake of our hypothetical question, Joe May and Julius Aussenberg; [134] Joe May being at that time a sole stockholder of the German corporation which is involved in our hypothetical lawsuit—entered into an agreement by which Aussenberg agreed to buy a part of Joe May's stock in the German corporation; and they also agreed, as part of that agreement, that in return for 45,000 marks, contributed to the assets of the corporation by Joe May, certain of the property and assets of the corporation should be assigned to Joe May, and that included in the assets, which were to be so assigned

(Testimony of E. O. F. Golm.)
under this agreement, was the claim of the German corporation against the American corporation for the 50,000 marks contractual penalty. Then let us assume that in due course the matter was heard and determined by the Kammergericht, which handed down the judgment on or about July 27, 1932, condemning the American corporation to pay to the German corporation the sum of 50,000 marks with interest in a certain amount. And let us assume that the judgment so handed down by the Kammergericht is the judgment of the Kammergericht which appears in this case as part of Plaintiffs' Exhibit 1, being the judgment in the action by May Film against Universal Pictures. That subsequently proceedings were taken by both parties, in the nature of a petition to the Reichsgericht, to review that judgment, which petition was rejected, so that the judgment of the Kammergericht became final. Assuming those facts to be true, do you have an opinion as to whether or not, under the law of Germany, the person we [135] have referred to as Joe May acquired any interest in or title to the claim of the German corporation against the American corporation?

Mr. Blum: I object to it as incompetent, irrelevant and immaterial. Counsel does not recite the full facts in the question involved here. It also attempts to express an opinion on or reexamine a judgment which has already been rendered in Ger-

(Testimony of E. O. F. Golm.)

many and has become final. It includes facts not in evidence and omit facts that are in evidence. It particularly does not include the fact that the sole director of the corporation consented to the particular transaction involved, towit, the sale of certain assets to an individual for a consideration, and that these facts have already been judicially determined by a court in Germany, and it is an attempt to go behind the judgment.

Mr. Selvin: Which determination in Germany are you referring to, the one in the case against Universal Pictures Corporation in which it was decided that these facts did not constitute a transfer?

The Court: I think counsel refers to a judgment to which Universal Pictures was not a party, which was sort of a friendly suit in which it was determined that Joe May was, in his individual capacity, the owner.

Mr. Blum: That is what I am referring to. And further, that it would attempt to impeach a final judgment.

The Court: The defendant here challenges the judgment [136] for various reasons; one of them being that Universal was not a party to the action; and he also challenges on the ground that it has no jurisdiction over the subject matter. If, under the law of Germany, a transfer of this character is not recognized the court that adjudicates the matter

(Testimony of E. O. F. Golm.)
is not only guilty of judicial error, but usurps jurisdiction in determining the matter.

Mr. Blum: There is no pleading in the file which goes to the jurisdiction.

Mr. Selvin: We deny the rendition of the declaratory judgment and plead affirmatively that it was not binding upon Universal Pictures for the reason that Universal was not a party to it.

The Court: I will overrule the objection. You have not indicated what facts are missing, and without that the objection is not valid.

Mr. Blum: There are no facts here showing whether the charter of this particular corporation did or did not prohibit the transfer.

The Cout: The witness has testified that there are certain requirements, under the German law, as to what the rights are, regardless of the charter of organization.

Mr. Blum: My understanding of his testimony was, that unless it was prohibited by the charter; not that the charter requires it. The charter may determine it, but it isn't required to be in, or not to be in the charter. [137] Furthermore, there is not included within the question that the board of directors, to-wit, the sole director, approved of the transfer.

The Court: Well, I will add that to the question and ask that it be answered in the light of that addition.

Mr. Selvin: Do you understand the addition?

(Testimony of E. O. F. Golm.)

A. I understand the addition. The first part, assuming the facts given to me to be true, would be an agreement between—if it is permissible I would like to give the names of the two persons, Joe May and Aussenberg—by which agreement Joe May paid.

Q. Yes.

A. The intention of this agreement was that he should acquire certain assets belonging to the corporation, and among them the claim in question against Universal. There can be no doubt, according to the German law, that an agreement of such kind could never bring about a transfer of such assets, particularly of this claim, because neither Aussenberg nor Joe May were entitled to dispose of the claim. The claim belonged to another person, a persona juris, the Aktiengesellschaft, which is entirely different from the individual stockholder. And, of course, this agreement is not without any value. It has to be interpreted as to the will of the contracting parties. And this interpretation would lead, in this special matter which you wanted me to assume to be true, would lead to the conclusion that the parties intended to say that one of the contracting [138] parties, to-wit, Aussenberg, would no longer be interested in those assets, but that Joe May——

Mr. Blum: Your Honor, I don't want to interrupt——

(Testimony of E. O. F. Golm.)

Mr. Selvin: Then please don't. Let him finish his answer.

Mr. Blum: The witness here is not giving an interpretation of German law. He is trying to give his opinion of what the case would be.

The Court: That is what he is an expert for. Objection overruled. You may cross-examine Dr. Golm on his opinion.

The Witness: I wanted to say that in our law there is a special provision which says that in cases like this there must be an interpretation of this agreement. And I wanted to add to which effect this interpretation would lead, which effect has been interpreted already by the Kammergericht in this case.

Mr. Blum: I object to that and ask that that last be stricken. He is answering as to a hypothetical question.

The Court: Yes.

The Witness: Now, as I understand, I should furthermore assume the fact that the governing body consented to this agreement.

Q. By Mr. Selvin: Let me ask you about that.

The Court: He will ask the question, Dr. Golm.

Q. By Mr. Selvin: Let us assume this: In addition to the agreement of the stockholders, assumed in the prior [139] question, that the governing body of the German corporation consisted of only one person, and in our hypothetical ques-

(Testimony of E. O. F. Golm.)

tion let us call that person Johanna Loewenstein. Let us assume that Johanna Loewenstein knew that there was such an agreement between the two stockholders and that she had no objections to signing an intermediate balance sheet of August 15, 1930, which was after the date of this agreement between the stockholders, and agreed to the contents of the agreement between the two stockholders. And that in this intermediate balance sheet which she signed, and according to this intermediate balance, Joe May paid to the German corporation 45,000 marks, and there was assigned to him, in consideration, the assets, including the lawsuit against Universal Pictures. Assuming those facts, in addition to the facts previously assumed, would there be any difference in your answer?

A. There would be a slight difference in the answer. Of course, this question couldn't be answered generally in an affirmative or a negative manner, because the assigning of a balance sheet, an interim balance sheet, as far as I understand, does not replace a real assignment. In order to make this transaction valid the governing body, in this case Mrs. Johanna Loewenstein, would have had to transfer the claim from the May Film Corporation to Joe May. However, if this claim was mentioned as to being transferred to Joe May in the interim balance sheet, and if Johanna Loewen-

(Testimony of E. O. F. Golm.)

stein, [140] as the only member of the governing body, did consent to this balance sheet, then it could be concluded, by means of interpretation also, that notwithstanding and apart from the foregoing agreement she wanted to assign this claim to Joe May, and this assignment could be considered as valid. In order to answer the question completely I would have to see the balance sheet and the contents of it, because otherwise it couldn't be answered in a very decisive manner.

Q. But would this be true. That until such time as there was what you call a real assignment executed by the governing body of the corporation, would there have been effected, under the German law, any transfer to Joe May of the claim?

A. No, it would not. The assignment of the governing body, the only organ of the stockholder company which has the right to dispose of the property, is indispensable for a transfer of a claim to a stockholder.

Q. Would the mere fact that the governing body knew that an agreement for such assignment had been made between the stockholders, and made no objection to it, take the place of a real assignment?

A. The knowledge alone would not take the place.

The Court: Suppose she had approved, in this interim balance sheet, the agreement. Would that

(Testimony of E. O. F. Golm.)

be effective as an assignment or would that merely be sort of an agreement to do something in the future, to legalize it? [141]

A. In order to really answer this question you would really have to know what she had in mind when she consented to this agreement. She could have in mind that she wanted to assign the claim, but she also could have in mind that she assented to the agreement between the two stockholders, on the basis on which one of them was no longer interested in the assets, and the proceeds of these assets had to be to his benefit.

The Court: My question would be this: Would it be effective, as an agreement on her part, to complete the transaction at some future time through proper legal documents?

A. At least to this degree: That she was under the obligation to deliver the proceeds coming out of this claim to him in case she consented to the agreement.

The Court: Would the right of any intervening creditor affect such a promise?

A. It would.

The Court: It would? A. Yes.

Q. By Mr. Selvin: That is, if between the time of the making of the promise and the receipt of the proceeds there were creditors of the corporation which came into being?

A. This is a question as to a term which we call relatively valid; whether this agreement was

(Testimony of E. O. F. Golm.)

both invalid against the creditor, as interested in the assets of the debtor of the May Film [142] A.G., and it was valid against any other third person.

The Court: In discussing the problem of the relationship of the members of a corporation of this character; that is, the stockholders, aktionare, you didn't say anything, Doctor, about the right of creditors. I assume that, in addition to any proprietorship, in fact, over and above the rights of stockholders to the assets of the company, are the rights of creditors——

A. They certainly are.

The Court: ——to the satisfaction of whose debts the assets must be applied before stockholders can assert any right. Isn't that generally the law of Germany? I assume it is the law of every civilized country.

A. It is the law of Germany, with certain restrictions. We have this law: A transaction can be valid between two persons or between other persons, but at the same time not be valid if the creditor——

The Court: We have the same. We have all sorts of transactions which are valid—we use the Latin term inter sese—and not valid as to third parties, in so far as they affect the right.

The Witness: Your Honor, we have the term anfechten, attack. The creditors may anfechten——

The Court: Challenge?

(Testimony of E. O. F. Golm.)

The Witness: Yes. Such a transaction by the debtor in fraudem of the creditors, with the effect that it has to be considered to be void in so far as the rights [143] of the creditors are concerned.

The Court: Is there a provision, for instance, in the law that before all the assets of a corporation, or a substantial portion of the assets—say a claim of 50,000 marks, which is a sizable sum of money—may be assigned to one of the directors, or to someone else, that any kind of notice must be given to creditors? Have you any such thing requiring notice to creditors before assets are distributed to stockholders, such as exist in the corporations of many states?

The Witness: We have, your Honor, the general rule which provides this, and this is the point which I had in mind when I first referred to the statutes of the corporation—it usually says in the statutes, and is a rule which applies to the case of liquidation—and this rule says that, first, the debts of the company have to be paid before the liquidator may dispose of any assets. And it means, furthermore, that in the relation to the liquidator a disposal of assets would be invalid.

The Court: I see.

Q. Mr. Mr. Selvin: Upon the facts which we assumed in my first question, Doctor Golm, do you have an opinion as to whether or not the party, that

(Testimony of E. O. F. Golm.)

we referred to in the hypothetical question as Joe May, acquired, by reason of those circumstances, any interest in or title to the judgment of the Kammergericht, as distinguished from the claim upon [144] which the judgment is founded?

A. In German law you cannot transfer a judgment, as such; that means the document. You can transfer only the claim, and the title to the judgment follows the title to the claim.

Q. So that if no title to the claim was acquired none was acquired to the judgment?

A. That is impossible.

Q. Upon those same facts, and assuming the opinions you have already expressed are in force, does it follow that no person could acquire title to the judgment from or through Joe May?

A. I understand I should assume this to be true: That Joe May did not acquire the claim against Universal; whether another person could acquire this claim from him?

Q. That is right.

A. This question has to be answered in the negative, without any doubt.

Q. Is there any procedure, under German law, for effecting a transfer on the record of a judgment, or at least of the right to enforce a judgment, from the judgment creditor to some other party?

A. Supposing in the case the party has a judgment, which means really that the party has a claim

(Testimony of E. O. F. Golm.)

against a certain debtor which has been confirmed and made enforceable by a judgment. There is a legal way to have this claim and the [145] judgment transferred to a new creditor. This procedure is laid down not in the Civil Code, of course, but in the Code of Civil Procedure. However, to go a little bit into the details, if you want me to explain it: Every judgment in Germany which condemns a party to pay a certain amount has, in order to be enforced by way of execution, to bear a so-called vollstreckungsklausel; that means to bear a certain writ of execution. This writ of execution is essential, if a judgment is intended to be enforced, compulsory by the creditor. Now, if the creditor wants to transfer the claim and the judgment, then the new creditor, the assignee, has to bring in a motion with the proper court, the court of execution, to have the writ of execution transferred to him. That is a provision in our Code of Civil Procedure. And this provision also states that the new creditor, who wants to have this writ of execution to be transferred to him, has to prove his rights by documents publicly certified or attested. If he can't prove the transfer of the claim to him by those documents, in order to obtain the transfer of the writ of execution, then he has to institute a special action before the Court of Civil Procedure, and this action has to have the motion, "May it please the court to give the order that the writ of execution contained in

(Testimony of E. O. F. Golm.)

this judgment may be transferred o the new creditor," which is the plaintiff in the new action. This is the way in which it has to be done. In this procedure he is not bound to produce only public [146] documents, but he can also rely on other means of evidence and proof.

Q. In this action, which he brings for the purpose of having the writ of execution transferred to him, who are the necessary parties to that action, under German law?

A. The new creditor, which wants to have it transferred, is the plaintiff; and the debtor against the writ of execution, which has been issued by the court, is the defendant.

Q. In other words, then, translating it into the terms of our own case, if Joe May or some successor of Joe May desires to have transferred to him the writ of execution arising out of the judgment against the Universal Pictures Corporation, it would be necessary, in an action brought for that purpose, to have Universal Pictures Corporation as the defendant?

A. Well, the first thing would be that Joe May or his legal successor would submit the judgment and an assignment of the claim awarded in the judgment to him and ask for a transfer of the writ of execution.

Q. That can only be done if the transfer is what you call publicly attested documents?

(Testimony of E. O. F. Golm.)

A. Yes. If the court denies this then he has to institute an action.

Q. And that action, in our case, would have to be against Universal Pictures Corporation?

A. Both procedures against Universal Pictures [147] Corporation.

Q. Until that is done, until there has been a transfer by reason of the granting of the motion to transfer, or a transfer by reason of a successful judgment against the judgment debtor, has the alleged or claimed transferee ever any right, under German law, to enforce or collect the judgment?

A. He couldn't have any right, because the writ of execution doesn't bear his name. And the authorities in Germany, which have to deal with the execution, would simply refuse to execute the judgment, because a judgment can only be executed in favor of a party which is a litigant party or a legal successor, after the writ of execution has been transferred to him. [148]

Q. By Mr. Selvin: Dr. Golm, this morning, in the course of your testimony, you used the phrase, "writ of execution." Will you explain a little bit more fully just what the significance of that phrase is, as used in the German law?

A. Well, I want to translate our German word "vollstreckungsklausel", which is defined literally in Section 725 of the German Code of Civil Procedure. This means that every judgment, to be enforced by way of execution, has to have this voll-

(Testimony of E. O. F. Golm.)

streckungsklausel, an authorization given by the court's clerk, in certain cases by the judge himself, to the party who executes the judgment, and the party presents this—I will use the German word again—vollstreckungsklausel to the sheriff or to the court of execution whenever this party wants to execute the judgment. As far as I know, in American law, the writ of execution is not given to the party who wants to execute the judgment. It is given to the sheriffs directly. Therefore, maybe the translation "writ of execution" might not be the literal term for "vollstreckungsklausel", but I don't know if there is a better word to use. The Latin word would [150] be "clausula executorie." I think the German law gives the translation "writ of execution," as far as I recall. Anyway, it is the thing which most resembles our vollstreckungsklausel, as defined in Section 725 of the German Code of Civil Procedure.

Q. Is there any such thing in the German procedure as enforcement of a judgment by another action brought upon that judgment?

A. There is, in cases like this, for instance; if a foreign court, a court of a foreign country, has rendered a judgment, and the reciprocity is guaranteed between the two countries, then the party who wants to enforce, by way of execution, the judgment of a foreign court, may institute some kind of an action based upon a res adjudicata. That is pro-

(Testimony of E. O. F. Golm.)

vided for in section, I think it is 744. It is in the same part of this—it is Section 722 of the German Code of Civil Procedure, where there is an action based upon another judgment in order to enforce it by way of execution.

Q. Is that applicable to domestic judgments? Is there such a procedure as enforcing a German judgment, in Germany, by another action?

A. No. If a judgment has been rendered in the case and it is enforceable by way of execution there is no other action based upon res adjudicata, because it isn't needed. [151]

Q. By Mr. Selvin: Doctor, I am going to show you Plaintiffs' Exhibit 3 in this case, which purports to be the record in the case of the Bank for Foreign Commerce against the May Film Company, and call your attention to what is marked page 3, and is also marked page 181, of that record——

A. Well, that is only for the photograph copy.

Q. In any event, we identify the page by the number at the top, which is 3, and in the lower left-hand corner it bears the numerals 181. There is, on that page, what purports to be an agreement, a copy of the agreement between Joe May and Charles Aussenberg respecting the transfer of the assignments of the May Film Corporation. You have read that, have you not?

A. Yes, I read this.

Q. For the purpose of my question let us assume

(Testimony of E. O. F. Golm.)

that this quotation is, in fact, the agreement between Joe May and Aussenberg. I call your attention to another page, which at the bottom bears the numerals 184, where there is what purports to be the balance sheet of August 15, 1930. Let us [152] assume, for the purpose of my question, that that was in fact the balance sheet of that date of the May Film Corporation. Let us assume further that Miss Johanna Loewenstein, the sole member of the governing body, approved this balance sheet. Let us assume further that the agreement of which Miss Loewenstein had knowledge and to which she assented, according to her testimony in this case, was the agreement to which I call your attention on page 181. Assuming all those facts do you have an opinion as to whether or not those facts would be effective, under the law of Germany, to transfer or assign to Joe May the claim of May Film against Universal? A. I have an opinion.

Mr. Hirschfeld: To which we object, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial. The particular ground that we would like to rely upon here, in addition to the general objection, is that it attempts to go behind a judgment. The documents that have been read are contained within a judgment roll upon which a judgment has been rendered by a court of competent jurisdiction. The witness is now asked to decide whether or not that judgment of that court is proper.

(Testimony of E. O. F. Golm.)

The Court: But unless that judgment is a judgment in rem, which bars the persons, it may be attacked collaterally in any proceeding by a person who is not a party.

Mr. Hirschfeld: Of course, your Honor, we are basing our [153] contention on the theory that, first, it is a judgment in rem.

The Court: I have not yet decided that question in your favor. If I follow the reasoning of the Ninth Circuit Court of Appeals, that a judgment of the court of the United States is not res adjudicata as to outside parties, I shan't decide in your favor. That second judgment determines that May Film is not a judgment creditor, but that Joe May was.

The Court: I am not questioning it, but I am just saying that, because if that judgment is a final judgment which binds them there is no defense left. You see, it is admitted that these courts are courts of competent jurisdiction and it is admitted that these judgments have been rendered.

Mr. Hirschfeld: I don't want to urge at length that objection, but I do want it——

The Court: To protect your record.

Mr. Hirschfeld: Yes; so that we could be heard to say we have saved it. I simply ask for that leave, to move to strike, it being understood that it is reversed, when this is further developed.

The Court: Objection overruled.

(Testimony of E. O. F. Golm.)

Q. By Mr. Selvin: Will you state what that opinion is [154] and the reason for it?

A. It is an agreement which is only partly quoted here.

Q. It is only partly quoted, but it apparently purports to be a quotation of all that relates to that transfer, does it not?

A. Yes, that is right. It doesn't say anything about a transfer concerning the claim against Universal from the May Film A. G. to Joe May. It says that certain assets, which are necessary for the new production, are reserved for the company, and that other assets have to be—well, it says, "Have to be acquired by Joe May." The balance sheet does not mention the claim against Universal, either, but only gives the figure, telling us to which amounts they were assets and to which amounts they were liabilities. The balance sheet, by the way, is an interim balance sheet, as is shown by itself. In my opinion, and I am pretty sure about that, I would never consider this as an assignment of a claim—of a special claim to Joe May. The second part of the question: I was asked, assuming the fact to be true that Miss Johanna Loewenstein has agreed to this agreement between Mr. May and Mr. Aussenberg, did this agreement constitute an assignment—a transfer of the claim. I would also answer no. And I can answer, from my long experience, that I have never seen an assignment

(Testimony of E. O. F. Golm.)

made by a governing body of an aktiengesellschaft in this way, in consenting to an agreement thereto which, as it is said, he will refrain [155] from any interest one person has to acquire certain assets which are not specifically named, the dubious assets.

Q. By Mr. Selvin: What, in your opinion, Dr. Golm, would be necessary, in addition to that agreement, the balance sheet and Miss Loewenstein's assent thereto, in order to effect a transfer of the claim to Joe May?

A. Miss Loewenstein's assent to this agreement has the legal meaning that she, as far as her capacity as the only member of the governing body is concerned, has no objection to this agreement. It can't mean anything else. Now, if she wants to execute this agreement in order to make complete Mr. Joe May's acquisition, she would have to draw an assignment which would read, for instance, "In execution of this agreement I hereby assign a claim against Universal to Mr. Joe May in my capacity as the only member of the governing body."

Q. Dr. Golm, using the term "judgment in rem" in the sense of a judgment or decree, by a court, which is conclusive evidence against the entire world of the fact or facts [156] which it determines or adjudicates, is there any such thing as that in the German law?

A. I wouldn't say that there was no such thing in the German law, because there might be a judg-

(Testimony of E. O. F. Golm.)

ment concerning the status of a person, such as whether a person is a legitimate child or whether a person is the child of a certain father. That would be binding upon everybody. And if you call that a judgment in rem I would say there is such a thing.

Q. Using the term "judgment in rem" in the sense in which I have indicated, would a judgment in Germany between two parties, declaring one of them rather than the other to be the owner of a certain claim, be a judgment in rem?

A. There would be no doubt that it could never be a judgment in rem. Never, under no conditions.

Q. The judgment of the Landgericht, which is in evidence here as part of Plaintiff's Exhibit 1, that is the judgment between the Bank for Foreign Commerce and May Film——

A. Yes, I know this judgment, because I translated it.

Q. In your opinion is that judgment a judgment in rem, using the term "judgment in rem" in the sense which I have indicated?

Mr. Hirschfeld: We object to that on the ground it is incometent, irrelevant and immaterial.

The Court: Overruled.

A. This judgment is a declaratory judgment which says that a claim, the claim against Universal, is owned by [157] Joe May—or it says, "Is hereby established that this claim is owned by Joe May," it is rendered in a lawsuit between the Bank for Foreign Commerce and the May Film A. G.,

(Testimony of E. O. F. Golm.)

which was represented by its liquidator. It creates law only between the two litigant parties, and nobody else is bound to this establishment. It is a declaratory judgment which has effect only between the two litigant parties.

Q. Does that judgment have any effect, under German law, as in any way affecting or concluding the rights, duties or obligations of the claim respecting that judgment?

A. No, it would not. And for my answer refer to the answer to the former question.

Q. Would that judgment in Germany have the effect of precluding or preventing Universal from contesting or challenging the fact of an assignment having been made?

Mr. Hirschfeld: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. It would never prevent Universal from doing so.

Q. (By Mr. Selvin): If I understand your opinion correctly, then, in so far as Universal is concerned, the question of whether or not there was an effective transfer of the claim from May Film to Joe May is in no way concluded or affected by that judgment?

A. This judgment concerns the relationship between the Bank for Foreign Commerce and the May Film A. G., and to that extent [158] it establishes

(Testimony of E. O. F. Golm.)

that the claim is owned by Joe May. That is the meaning of this judgment.

The Court: Let me ask you this question, in the light of what you have just stated: Assume that the Universal Corporation had paid the money to Joe May——

A. Yes.

The Court: ——could Joe May, upon the record of the judgment in the first case, enter a satisfaction of the judgment with the court upon presentation of a receipt from Joe May?

A. This judgment was rendered in favor of May Film A. G.

The Court: Yes.

A. So in order to pay this judgment it would have to be proved that after this judgment was rendered or before it was rendered a legal succession from May Film to Joe May was executed; otherwise there wouldn't be any satisfaction as to this judgment.

The Court: There is such a thing as what is called satisfaction of judgment of record in German law, is there not, either by execution or voluntary payment? Suppose execution is levied and payment is made. There is a notation that this is paid out?

A. There is a receipt and a party who made the payment is entitled to claim—now, I come back to my word "vollstreckungsklausell". The party who made the payment has a right to claim—to be given

(Testimony of E. O. F. Golm.)

this judgment containing the [159] writ of execution, and without the writ of execution no execution would ever be possible again. This protects the party against an execution for the second time.

The Court: Without an entry of such a satisfaction in favor of the Universal Company, showing payment to the May Film Company, would the Universal Company be protected against a possible execution being levied in the name of the Aktiengesellschaft, by the attorney who represented them, in execution of any assets they may find in Germany?

A. Universal could have, as we call it, exceptio doli. It could say, "The May Film A. G. represented by its liquidator, tries to enforce an execution, a judgment, which in another trial, in which this same liquidator was a party, was considered, not to belong to the liquidator."

The Court: That is, the liquidator?

A. Yes.

The Court: In other words, they would be protected against the liquidator because of this judgment?

A. They would be protected against the liquidator because of this judgment, but not as far as the procedure is concerned. They have to institute a new trial asserting that the procedure is against bonos mores.

The Court: Yes.

Q. (By Mr. Selvin): But in the absence of such a procedure May Film could execute the judg-

(Testimony of E. O. F. Golm.)

ment, notwithstanding payment to Joe May? [160]

A. Oh, surely.

Q. Suppose, Dr. Golm, that as against Universal Joe May should claim that he is the owner of the judgment. Would Universal be precluded from denying that he is the owner, by virtue of the judgment between the Bank and May Film?

A. No. As I said before, this is a judgment between the Bank for Foreign Commerce and the May Film A. G., in liquidation, and only binding upon these two parties, and not protecting Universal against the claim of Joe May.

Q. Is there any difference in the law of Germany between what is called a guarantor and what is called a surety?

A. Well, the translation of our German word which defines a surety, which means a surety, is very often given as a guarantor; but in German law suretyship is a special type of a contract related to other types of contracts, through which a person may assume the responsibility to guarantee a certain obligation, a certain success. But a guaranty is not the same, always in German law, as a suretyship.

Q. What is the difference between the two?

A. The suretyship is exactly and precisely defined in Section 765, I believe, of the German Civil Code, and it says: "By the contract of suretyship, the surety obligates himself to the creditor of a third party to answer for the obligation of the

(Testimony of E. O. F. Golm.)

latter." That means, in other words, that the suretyship is always an accessory to the obligation [161] of the principal debtor and that a surety promises to be liable for this obligation and that he could be made liable in case the principal debtor doesn't pay. A guaranty means garentie-versprechen, or we should say the promise of a guarantee means that the person who guarantees, who undertakes the guaranty, wants to guarantee a certain success. A guaranty, for instance, might be taken for an argeement which later on is not to be found valid by the court. In this case the guaranty exists, nevertheless, but the suretyship would not exist. Because the obligation of the principal debtor is not valid the suretyship could not be valid, either. So we wouldn't use the word "guaranty" for the German word "burgschaft", which is suretyship.

Q. That is the German word for suretyship?

A. Yes.

Q. What is the German word for guaranty?

A. Garentie or garentie-versprechen.

Q. Is there any difference between those two forms of obligation with respect to the rights of the guarantor or the surety, as the case may be, to have transferred to him, by operation of law, the claim of the principal creditor against the debtor?

A. There are many differences. For instance, if the obligation of the principal creditor is not legally valid the guaranty exists, but not the suretyship. Another difference is what was quoted by

(Testimony of E. O. F. Golm.)

one of the counsel of the [162] plaintiff party the other day, Section 774 of the German Civil Code. This is a provision which applies for suretyship only, not for contract obligations, which have a certain relation or resemblance to a suretyship without being a suretyship; stated by the Supreme Court many times.

Q. Let us assume that A becomes the guarantor of an obligation which X owes to Y—becomes a guarantor, now, in the strict sense in which you have used it, and not a surety—and that when that obligation from X to Y becomes due that A, the guarantor, pays it. Does A, by virtue of the payment, succeed to any of the rights of Y against X?

A. I understand in that question that you don't want to use the word "guarantor" in translation of the German word "burge" in the same sense as surety?

Q. That is right.

A. Then this guarantor would not acquire it, because it is an independent obligation. This Section 774 is applicable to cases of surety only.

Q. And would the same answer be true with respect to any securities which the principal creditor held as to his claim?

A. If the claim is not transferred the security is not transferred either.

The Court: Is the conduct of surety made contemporaneous with the main contract of surety?

A. Not necessarily. [163]

(Testimony of E. O. F. Golm.)

The Court: Not necessarily?

A. Not necessarily. It can be made any time, before or later.

The Court: The contract of guarantor, then as I understand, the surety becomes liable primarily with the main obligor?

A. There are two types of surety. The surety can assume a suretyship, as a principal debtor; we call it "selbstschuldnerische burgschaft"; or the ordinary type of suretyship, which is liable only in the case that an execution against the principal debtor has been attempted, but without success, in certain cases where it isn't necessary to try an execution, where it is already known that the principal debtor is frustra excussus.

Q. (By Mr. Selvin): I am going to call your attention to page 5 of Plaintiff's Exhibit 10, which is the deposition of Erich Lenk, and call your attention to the answer to the question, "And will you tell us, please, what arrangements were made in regard to this particular loan for collateral in favor of your bank?" Will you read Mr. Lenk's answer, Dr. Golm?

A. I did not see this before.

Q. Will you read it now?

A. Yes. Mr. Lenk's answer?

Q. Mr. Lenk's answer. Have you read it to yourself? A. Mr. Lenk says—— [164]

Q. Just a moment. Have you read it to yourself? A. Yes.

(Testimony of E. O. F. Golm.)

Q. From those facts, or from those purported facts which Mr. Lenk testifies to, is it possible to determine whether the relationship between Mandl and the Bank for Foreign Commerce was that of burgschaft or that of garentie?

A. It isn't clear, because he uses the English term "guaranty" and speaks about a personal guaranty of his wife, a stamp collection, and then he adds "unlimited guaranty of Mr. Fritz Mandl. And furthermore, the assignment of a claim." But it doesn't say anything as to which type of guaranty or suretyship it was.

The Court: Does that notice, in German, to Universal, which is part of Plaintiffs' Exhibit 5, throw any light on it?

Q. (By Mr. Selvin): You can read this and see if there is anything in there that indicates whether the relationship between Mandl and the Bank was burgschaft or garentie-versprechen. That is the letter which is part of Plaintiffs' Exhibit 5.

A. You mean here?

Q. Well, read the whole letter.

A. This letter has two parts. The first part is a quotation of a document made out by Mr. Joe May personally, and there he says that the claim is formally owned by May [165] Film, but essentially or materially owned by himself, and that he assigns this claim to the full extent and with all interest to the Bank. And then the Bank goes on and says, "As a further security for our claim we have, as

(Testimony of E. O. F. Golm.)

surety"—they use the German word burgschaft—"we have a suretyship undertaken by Mr. Fritz Mandl." Then they go on and say that since Mandl paid there was a transfer. This speaks about a suretyship of Fritz Mandl, but not about a suretyship assumed by Mr. May.

Q. Would the nature of the relationship between Mr. May and the Bank have any effect on the question of whether or not Mr. Mandl succeeded to the claim against Universal?

A. The question is this, as far as I understand: I have to assume the fact to be true that this claim against Universal, together with the assignment, was given as security or assigned or in some way transferred to the Bank by Mr. May?

Q. Yes, assume that.

A. So if Mr. May undertook a suretyship the question as to whether there was a transfer by virtue of law is to be answered in a different way than if he had not assumed a suretyship, but had some kind of a guaranty or some kind of an independent obligation toward the Bank.

Q. Is there anything in this letter, which is part of Plaintiffs' Exhibit 5, which indicates that Mr. May assumed one, rather than the other, form of obligation [166]

A. It only says that suretyship was assumed by Mr. Mandl. If this leads to the conclusion that suretyship was assumed by Mr. May, I don't dare say it.

(Testimony of E. O. F. Golm.)

Q. In other words, there is nothing in this letter to indicate what Mr. May's relation was——

A. No.

Q. ——because this letter from the Bank for Foreign Commerce to Universal, which is part of Plaintiffs' Exhibit 5—you have read that letter in its entirety?

A. Yes, I read it right now.

Q. Is that letter by itself effective, under German law, as a transfer or assignment of a claim to Mandl against Universal?

A. It isn't. This letter states certain facts, and then it comes to the conclusion that according to German law, in this special section mentioned here, that there was a transfer, by virtue of operation of law, to Mr. Mandl. Then it says, "Therefore, also, the claim assigned to us against Universal, amounting to Reichsmarks 50,000 and interest is 'ubergegangen' ". That means "has gone over by operation of law." They don't say "assigned." It is "ubergegangen" to Mr. Mandl. They give the juridical opinion about this action and then they come to the conclusion that after this Universal must pay to Mandl in order to be freed from the obligation which is concerned by the judgment. [167]

Q. Assuming that the facts recited in that letter are by themselves insufficient to effect a transfer, by operation of law, from the Bank to Mandl, would the letter be treated or considered, under German law, an assignment or transfer?

(Testimony of E. O. F. Golm.)

A. No, it isn't an assignment. It doesn't pretend to be an assignment. It only says there was an operation of law and, therefore, Mandl is now the legitimate creditor.

The Court: Is it a notice of assignment?

A. It is a notice not of assignment, but of a transfer by law, so that Universal would be protected. If, on the basis of this notice, Universal would pay to Mandl, Universal would be protected——

The Court: By the bank?

A. ——by the bank, but not by any other creditor who claims rights against Universal.

The Court: In other words, it is an admission against interest, that if the debtor paid out money he would be protected?

A. Yes. If the former creditor says, "I am no longer your creditor, but another person is your creditor and I want you to pay for this," then he could never later unclaim that. [168]

Q. (By Mr. Selvin): But payment and reliance on that letter would be protection for Universal only as against the Bank?

A. Against a new claim of the bank, since the bank itself gives notice that "We are no longer creditor but that Fritz Mandl is creditor." How could the bank come and claim it again?

Q. But it could not be protection against anyone else? A. Never.

(Testimony of E. O. F. Golm.)

Q. Suppose that upon receipt of this letter Mandl demanded payment of Universal. Would this letter in any way preclude or conclude Universal from contesting the fact that Mandl did not become the owner of the claim?

A. It would not, for this one reason alone: That the Bank says Mandl has become the creditor by operation of law. And if Universal wants to contest that operation of law and say, "The Bank made an erroneous statement. There wasn't any operation of law," this right is always reserved.

The Court: Let me ask one other question. If, in addition to the assignment of the claim, they also took other pledges or—— A. Securities?

The Court: Sort of securities——

A. Yes.

The Court: ——what is there in that letter to indicate that those securities had been valueless and that the entire claim was satisfied through the payment by Mandl? [169]

A. There is no indication as to the other securities and their value, and they don't say even what amount it is. They only say, "We have been satisfied by Mandl and, therefore, the claim"—which was a security; at least, economically speaking, a security. They also speak about an assignment, which is quite different from security. But security, for our purpose,—"has been transferred by operation of law to Mandl. They don't say any-

(Testimony of E. O. F. Golm.)

thing about the other security or whether they have attempted to seek satisfaction out of it.

The Court: Could anybody on behalf of May Film claim, in the face of this record, that Mandl did not, in fact, pay full value and that the Bank discounted the claim without authority and that they also sold the stamp collection and other things to satisfy their debt, so as to raise the question whether, as against them, Universal had the right to pay the full amount of the claim to Mandl?

A. Your Honor, in order to answer this question I have to say first, that assuming there is an operation of law, the claim of the creditor only can be transferred, and not the claim which was assigned to the creditor. The claim of the creditor, and only to the amount to which there is regress by the paying surety "burge", or whatever it is, against the person who is liable for it. But, for instance, if the bank had this claim, 50,000 marks—now, I just make an instance — and Mandl paid 25,000 marks—— [170]

The Court: Yes.

A. Then, if there was a transfer of law—by operation of law, it could have taken place only to the amount of 25,000 marks.

The Court: Pro tanto.

A. Yes. Because the law says, that in so far as a surety satisfies the creditor the demand of the creditor is transferred to him. So if a surety only pays a part of the remainder of the balance of a

(Testimony of E. O. F. Golm.)

debt, then only to this amount the claim of the creditor is transferred, and only to the amount to which the claim is transferred he could seek satisfaction out of any security, if there was a security. But here, I would never say there was one.

Q. (By Mr. Selvin): With respect to what passes to the paying surety, under those circumstances, is there any difference in the German law between a claim, let us say, which is given to the principal creditor by way of lien, and a claim which is absolutely assigned to the principal creditor, but as security for the debt?

A. There is a very decided difference, as laid down by [171] the Supreme Court in a decision in Volume 89, in Section 774 of the German Civil Code.

Mr. Hirschfeld: I would rather you not quote the German law, until there is some foundation laid for that particular case, to show the jurisdiction, to show whether it is applicable.

Mr. Selvin: I didn't know you had to show the jurisdiction of the Supreme Court to cite one of its opinions as a precedent.

The Court: No. He is merely citing an opinion of the court.

Mr. Hirschfeld: But shouldn't there be more than just an isolated opinion. We will object on the ground that it is incompetent, irrelevant and immaterial. It is interesting, I admit, but it isn't material.

(Testimony of E. O. F. Golm.)

The Court: Without in any way assuming that this opinion, which the witness is about to quote, is binding upon the lower court, it is nevertheless entitled to weight as coming from a German court in high standing, and in opinions which are published. This witness may give them to support his own opinion.

A. Your Honor, I didn't want to say that this opinion is binding in any way, but only to add that this opinion has great weight on others. [172]

Mr. Hirschfeld: Since your Honor will not entertain the objection that he may not use it, I wonder if we might have the book and page and year?

The Witness: Yes. May I just have it for a minute, in order to express my opinion, and then give it to him?

The Court: The volume here comes from our own library.

The Witness: It is an official collection of decisions of the German Supreme Court.

The Court: It is Volume 89 of the Entscheidungen des Reichsgerichts, New Series. You have the page?

The Witness: I think I had it, but I am not quite sure. I think it is 193.

Mr. Hirschfeld: And the year? [173]

The Court: 1917.

A. This is the decision. It starts on page 193, and the part which I was referring to is on page 195.

The Court: Give us the substance of it.

(Testimony of E. O. F. Golm.)

A. The substance is that Section 774, which deals with a transfer by virtue of law to a paying surety, is not applicable in cases where there was not a security, a lien mortgage or other type of security, but a real assignment. And the decision states—and I may add that that is my opinion. I agree with this decision.—It states that in such case where there is a real assignment given by any kind of a guarantor, surety or debtor, but not a lien or other type of security, there exists only an obligation of the creditor after his satisfaction to reassign this claim or to transfer it to anybody else; but that there is never operation of law taking place, as in case of Section 774 and 401 and 426, which is quoted in 774. So it states that there is only an obligation. To answer Mr. Selvin's question, I would say that in this case, where there was a real assignment of a claim given by Mr. Joe May to the Bank, and the Bank was completely satisfied, the Bank was under the obligation to free this claim and to reassign it either to Joe May or maybe to Fritz Mandl, if the facts are correct, but that there was no operation of law transferring this claim to Mr. Mandl. It is different from the security mentioned in Section 401 and other security and the re- [174] assignment.

Q. (By Mr. Selvin): Referring once more to Plaintiffs' Exhibit 5, that part of it which consists of the letter of February 12, 1936, you will find there on the first page quoted what purports to be

(Testimony of E. O. F. Golm.)

an assignment from Joe May to the Bank of the claim against Universal.

A. They use the word "abtretung." The Latin word is "cessio". That means an assignment, or in German, "abtretung."

Q. What I mean, this letter quotes what the Bank says was such an assignment. Assuming that assignment was executed—and you understand it is my contention that that is no evidence of the fact that it was executed—but assuming that was executed, is or is not that a real assignment, as you have used that phrase in the answer last given?

A. Yes, surely, because he says, "I herewith assign the aforementioned claim based upon the judgment, to its full extent and with every interest or accessory claims, to the Bank for Foreign Commerce."

The Court: Then, as I gather the substance of your statement relating to this, it is this: That Joe May, having made an actual assignment, as contradistinguished from any assignment by operation of law—— A. Yes.

The Court: Then, before Mandl could acquire any right there would have to be a direct assignment from the Bank to him, and not a mere operation by payment of the debt; is [175] that correct?

A. That is correct, your Honor. If May makes an assignment to the Bank there was no operation by virtue of law, but the Bank was under the obligation to assign this claim, after the Bank was

(Testimony of E. O. F. Golm.)

satisfied, to Mandl who paid, or to May. This depends on other reasons. But at any rate, this claim remained in the ownership of the Bank as long as it wasn't assigned by the Bank.

Q. (By Mr. Selvin): Assuming, Dr. Golm, that in some way there was a transfer, by operation of law, of the claim against Universal, from the Bank to Mandl by reason of the fact that Mandl paid the May Film indebtedness to the Bank. I think you have already testified that the transfer by operation of law would only be in so far as he paid, that is, his pro tanto transfer. A. That is right.

Q. Let us assume that the claim, which so passes by operation of law, is a claim which in turn was assigned to the Bank, by way of security, for the suretyship or burgeschaft of Joe May of the same principal debt; that there was no agreement between Joe May and Mandl as to what their respective liability should be, as between themselves, in respect of their assurance of the principal debt. To what extent, if at all, would the security put up by Joe May pass, by operation of law, to Mandl? That is, assuming it did pass, to what extent would it pass? [176]

A. It would mean "mitburgen", co-sureties.

Q. Let's say co-sureties.

A. Co-sureties. The co-sureties are indebted in their relation to each other in equal parts. They are joint debtors. This follows from Section 774, paragraph 2, in connection with Section 426. In

(Testimony of E. O. F. Golm.)

other words, the relation between Mandl and May would be that Mandl would have acquired the right to claim contribution from May. They both would be liable to equal parts. That May had to pay half of the part which Mandl had paid, and to this part was liable to pay contribution to Mandl. So, as far as the security was given by Joe May to the Bank, and assuming the fact to be true that there was an operation of law through which this security passed, it would, so far as the relation between Mandl and May is concerned, only have the effect that now Mandl was entitled to claim contribution to the half from May, and to this extent seek satisfaction out of the security.

Q. Then, translating that, if we can, into actual figures, let us assume that the indebtedness of May Film to the Bank was 80,000 marks; let us assume that May Film paid 40,000 on that indebtedness and that Mandl paid the other 40,000. Let us assume that Joe May and Mandl were co-sureties in respect of May Film's obligation to the Bank. Then, upon Mandl's payment of 40,000 marks—well, there is one other assumption we have to make. That is, that [177] there was given to the Bank, by Joe May, as security, a claim against Universal in the principal sum of 50,000 marks?

A. Not by assignment?

Q. Not by assignment, but by way of lien.

A. Yes.

(Testimony of E. O. F. Golm.)

Q. We will assume that which is contrary to the evidence, but we will assume that upon Mandl's payment of 40,000 marks there was transferred to him the claim against Universal, which was put up by way of lien. To what extent would he be entitled to resort to that claim in satisfaction of the amount that he paid?

A. I have to assume that the debt was 80,000 marks and was paid to the amount of 40,000 marks?

Q. By Mandl. A. By Mandl.

Q. Yes.

A. Then only to this amount, at the utmost, could transfer of the creditor's claim be taken in consideration, because the claim didn't exist to a higher amount any longer. And as far as the relation between May and Mandl was concerned, Mandl would be entitled to claim contribution to the half of this amount from May. And to half of this amount the security would be a security for this claim of contribution. And on the question of the relation to the principal debtor—— [178]

Q. All right. Let us not get that far for the moment. Then, so far as his right to satisfy his claim against Joe May's security is concerned, it would be limited to the right of his contribution against Joe May? A. Against Joe May.

Q. That would be, on the assumed facts, 20,000 marks?

A. In so far as Mr. May is concerned.

(Testimony of E. O. F. Golm.)

Q. To what extent, then, could he enforce his claim against Universal, if it is by virtue of that fact?

A. By virtue of this fact, the relation between Mandl and Joe May wouldn't be the only decisive one, because there is also the principal debtor which has to be considered. And against the principal debtor the claim is still in existence, following this assumption, to the amount of 40,000 marks, and would be transferred to Mandl, to this amount, against the principal debtor.

Q. Then, assuming that the whole debt to the Bank was paid, part was paid by Mandl, the other was paid by May Film?

A. Then Mandl, in this case, would have paid 40,000 marks and would have acquired the claim of the principal creditor, to the amount of the 40,000 marks, against the principal debtor.

Q. May Film? A. May Film, yes.

Q. To what extent could he resort to the claim against [179] Universal?

A. There is a question that is doubtful. In this case the fact, which you ask me here to assume to be true, is that the security was put up by Joe May and not by the principal debtor.

Q. That is right.

A. There arises the question as to whether the security, which was put up not by the principal debtor, but by a third person, is also transferred

(Testimony of E. O. F. Golm.)

by operation of law. The question is contested in German law.

Q. Let us assume it is transferred by operation of law.

A. Then he would acquire the claim to the amount of 40,000 marks and, also, the security would be liable to this extent.

Q. If it passes by operation of law?

A. Yes.

Q. I understand that is a question——

A. ——which is contested. And the answer to this question depends upon the relation of the third person to the creditor, whether it was a real surety or whether he guaranteed his own obligation. For instance, if the third person says, "I am liable for this obligation, and as security for my obligation I give you this claim," then there wouldn't be the same legal consequence as in the other case.

Q. What would be the difference? [180]

A. As I said before, the suretyship is strictly an accessory, but there could be a guaranty or an independent obligation of the third person. And if the third person undertakes an independent obligation and gives a security this security can never pass to the paying suretyship.

Q. In other words, if Joe May put up the claim against Universal, as security for his own obligation, rather than May Film——

A. Which wasn't a suretyship. In this case there wouldn't be any transfer of the security, because it wasn't given by the principal debtor.

(Testimony of E. O. F. Golm.)

Q. There wouldn't be any transfer by operation of law? A. No.

Q. Let us assume, with respect to the situation that we have been discussing generally, that at the time Mr. Mandl made payment to the Bank of the loan which it had made to May Film, and assume that that occurred prior to the annexation of Austria by Germany, or the merger consolidation of Austria and Germany, whichever it was, and at that time Mr. Mandl was an Austrian national and not a citizen of Germany, would there be any requirement, under the law of Germany at that time, that before anything passed to him, either by operation of law or otherwise, in respect to the claim against Universal, that a permit from the Foreign Exchange Control Office be obtained?

Mr. Hirschfeld: I object to that on the ground that it [181] assumes facts not in evidence. There is no proof that any such control office existed.

The Court: Well, that is the object of the question.

Mr. Hirschfeld: Or that any such control office was necessary. The question is, is it necessary to have a permit from the Control Office.

Mr. Selvin: I will withdraw the question.

Q. Assume that the payment by Mr. Mandl to the Bank for Foreign Commerce took place prior to the annexation or union of Austria with Germany; assume further that Mr. Mandl at the time of the payment and at all times prior thereto had

(Testimony of E. O. F. Golm.)

been and was an Austrian national and not a citizen of Germany; was there any requirement of the law of Germany at that time, which imposed the obligation as a condition to the validity of any transfer of the claim against Universal to Mr. Mandl, that a permit be obtained from any agency, bureau, department, division or functionary of the German government?

Mr. Hirschfeld: To which we object, unless it is stated whether the German law was a written law or unwritten law.

The Court: There wasn't any unwritten law in Germany; at least, not at that time.

Mr. Hirschfeld: There seems to be a lot, according to the witness. If there was such a statute or section I think we should have the benefit of it.

The Court: As an expert he will tell you whether there [182] is any section, that covers, it in operation at that time. What year are you talking about?

Mr. Selvin: I am talking of the time that Mr. Mandl made his payment which, according to the evidence, is 1935. That is, assuming there is any evidence of payment; according to the recitals in certain letters it was in 1935.

The Court: Objection overruled. You may answer.

A. I have to answer first that it isn't decisive whether he was a citizen of Austria or Germany, but whether he was a resident of Germany, because

(Testimony of E. O. F. Golm.)

the conception of the so-called devisen-ienlander and devisen-auslander does not necessarily apply to the citizens, but to the residents. But if he wasn't a resident of Germany then he was, in our law, a foreigner in the meaning of the provision dealing with this authorization to be given by a Foreign Control Exchange Office; and this authorization would be necessary, under this assumption, to any payment which Mandl wanted to make in Germany proper, either in German reichsmarks or in German currency. But it wouldn't have been necessary if, for instance, he forwarded money from abroad to Germany. If an American citizen, an American resident, had a debt in Germany he can always pay it by sending dollars over there. They are wanted.

A. But he can't pay this obligation from a bank account he has in Germany. [183]

Q. (By Mr. Selvin): Let us assume that at the time in question he was neither a citizen nor a resident of Germany, that the payment which he made was made out of a French franc account which he had with the Bank for Foreign Commerce in Berlin.

A. Doubtless he needed the authorization of the Devisen stelle. The English interpretation might be "Foreign Currency Exchange Control Office."

Q. Would any such permit be required in order that there be transferred to him, either by actual assignment or by operation of law, a claim held by either a German corporation or a German resident against Universal Pictures?

(Testimony of E. O. F. Golm.)

Mr. Hirschfeld: To which we object on the ground that the question fails to include the hypothetical point that he stated in his first question, to-wit, assuming that Mr. Mandl was neither a resident nor a citizen.

Q. (By Mr. Selvin): Make that assumption, too. Make the assumption that he was neither a citizen nor a resident of Germany.

A. Assume the fact that he was neither a resident nor a citizen of Germany, he needed the authorization for any payment from a bank account of French francs in order to make the payment valid. But assuming the fact that this authorization was given to him, then the legal consequence connected with the operation—I mean the consequence by [184] virtue of law something was transferred to him—then he did not need, in my opinion, an additional authorization.

Q. But suppose that, as a consequence of the payment, there wouldn't be a transfer to him of anything by operation of law, but an actual assignment was made.

A. There would be needed an authorization, because this was a transfer of a claim or a piece of property in Germany to a foreigner.

Q. What would be the effect on the validity of such a transfer of the absence or failure to obtain such authorization?

A. In the meaning of the civil law a transaction executed without a needed authorization is not valid. The criminal law has other——

(Testimony of E. O. F. Golm.)

Q. In other words, there are criminal consequences?

The Court: I am only interested in the civil.

Q. (By Mr. Selvin): What would be its effect upon the civil transaction?

A. It wouldn't be valid.

Q. (By Mr. Selvin): Dr. Golm, when a claim passes to a surety who pays the principal obligation, assuming that the transfer to the surety is by operation of law, is there any provision or any principle of German law relating to the [185] interest, on the claim which was transferred, that the surety may recover? A. Yes, there is.

Q. What is that?

A. If there is a transfer by virtue of law from the creditor to the paying surety, then the surety does not acquire the right to claim the same interest which the creditor would have been entitled to claim in case the principal debtor didn't pay, but the paying surety is only entitled to interest at the rate of the so-called legal rate; that means four per cent; and this only if and in so far as the debtor is im verzuge, in default. I merely refer again, in connection with this, to a decision of the Supreme Court of Germany printed in this official collection of the decisions of the Reichsgericht, in Volume 61, page 343. In this decision the question is——

Mr. Hirschfeld: Pardon me. May it be understood that the objection made to the reference and use of the former book applies here?

(Testimony of E. O. F. Golm.)

The Court: All right.

A. In this decision the Supreme Court expresses the opinion, which is my opinion, too, and which I was expressing before, that in a case where transfer of law is executed to the paying surety this surety can only ask for interest at the legal rate and under the legal conditions. That means, principally, if the debtor is in default of payment, either [186] by an announcement executed by the creditor or by a fixed date for the performance of his obligation.

Q. (By Mr. Selvin): That is four per cent per year, isn't it?

A. Four per cent per year. Volume 61, page 343.

Mr. Hirschfeld: And the year?

A. The year? It is published in 1906. It is a decision of 1905. [187]